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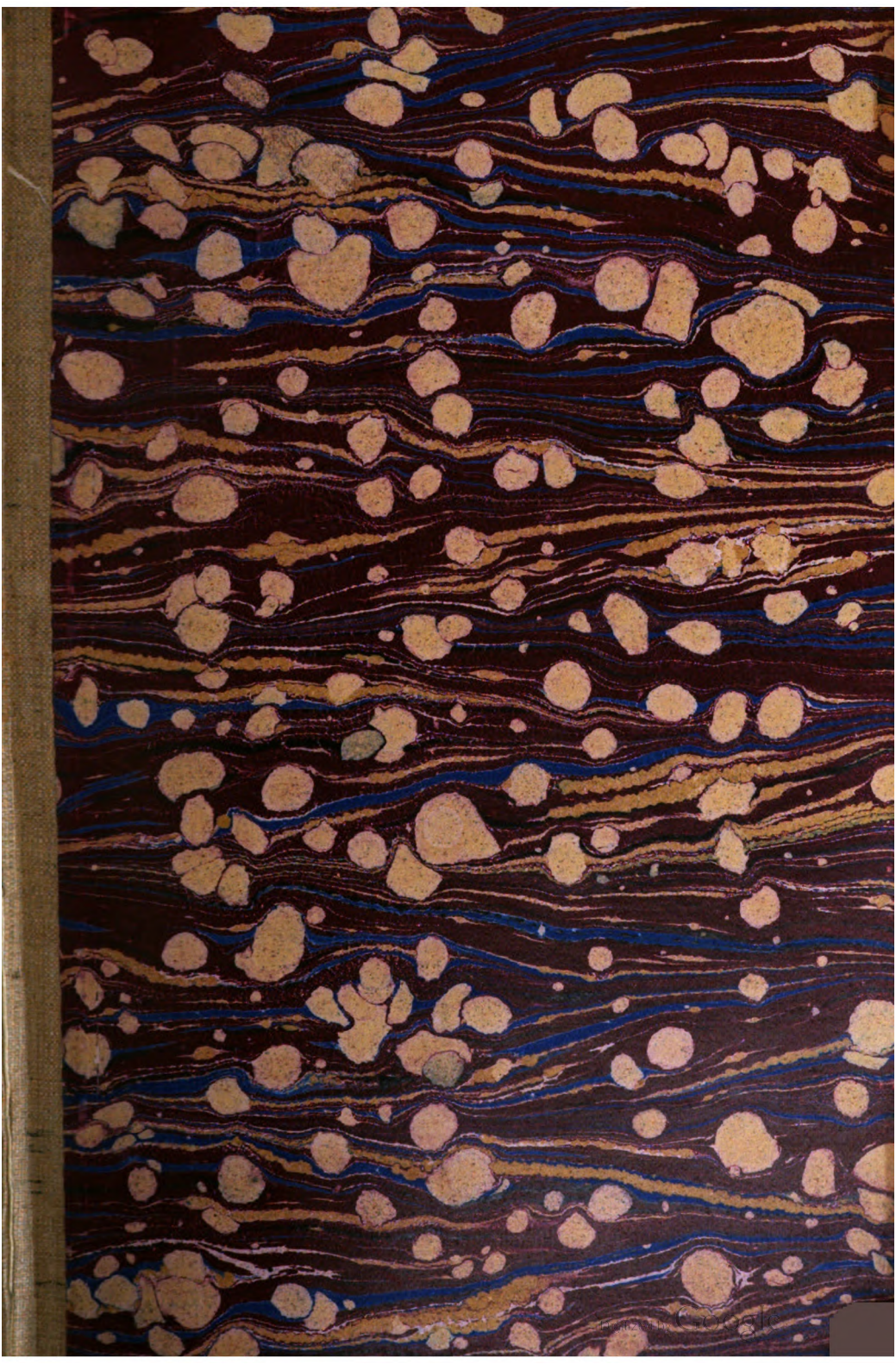
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**A SHORT CONSIDERATION OF  
THE LAW OF NEGLIGENCE.**





c #

A SHORT CONSIDERATION  
OF  
THE LAW OF NEGLIGENCE

BY  
ALFRED SINGTON,  
BARRISTER-AT-LAW, OF THE INNER TEMPLE AND OF THE NORTHERN CIRCUIT.

“The law with regard to negligence has somehow or the other  
got into a lamentable state of confusion.”—MR. JUSTICE LOPES, in  
*Brown v. G.W. Ry.*, 52 L.T. 622.

0

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DEDICATED, BY PERMISSION,  
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RIGHT HON. SIR RICHARD HENN COLLINS,  
THE MASTER OF THE ROLLS,  
THE HISTORY OF  
WHOSE CAREER ON THE NORTHERN CIRCUIT FORMS ONE  
OF ITS BEST AND MOST PLEASANT  
TRADITIONS.



## PREFACE.

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THE date when each case cited in the text was decided, and the various references where it will be found reported, are given in the Table of Cases. Only one reference appears in the body of the work.

I desire to express my obligations to my friend Mr. A. C. McBarnet, of 1, Garden Court, Temple, for having kindly undertaken the preparation of the Index.

A. S.

TEMPLE.





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# A SHORT CONSIDERATION OF THE LAW OF NEGLIGENCE.

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## INTRODUCTORY CHAPTER.

*The regard of the Common-law for the safety of the individual—Legal fictions—Common employment and Identification—Definitions—Uncertainty in the law—Discrepant judicial views in Railway cases—The use and abuse of technicalities—Effect of the Judicature Acts on the conflict between the Courts of Common-law and of Equity—The human interest in cases of negligence.*

As we take a survey of the earlier common-law cases dealing with the subject of negligence, we are struck in the first place by the extreme care, it might almost be said the tenderness, exhibited for the safety of the individual. It is somewhat curious to observe that whilst this feature manifests itself, so at the same time, that which now appears to us to be the extreme severity and barbarity of our penal laws was displayed almost without protest. This may perhaps be attributed, partly at least, to the predominant idea of the common-law that the protection of the individual and of his property required to be safeguarded with extreme care. Possibly this overriding consideration served for a time to render the public mind tolerant of the savage punishments imposed by the penal

The importance attached by the common-law to the safety of the individual.

code then in force, or at least unable to realize their barbarity.

The growth of legal fictions, and their effect.

Continuing our survey, we are next able to perceive a gradual slackening, not of the standard of care, but of its incidence in particular cases, and as applied to particular classes of the community. The web of legal fictions begins to be spun. Subtle judicial interpretations, legal theorizing, ingeniously suggested problems, begin to spring up, and finally become excrescences, as it were, which are suffered to grow over and to obscure the simplicity of the common-law. The operation of every legal fiction tends to the curtailment of individual rights, and to the enlargement of immunities collectively enjoyed. By judicial sanction they become a part of the common-law itself; and we find the law in many instances importantly altered, or amended, merely by the force of what is rightly termed judge-made law. This is, indeed, inherent in the system. While the common-law, as distinct from statute-law, is for the most part traditional; where new circumstances and fresh combinations arise, the common-law is in effect what the judges declare it to be. These declarations are always assumed to be based upon or derived through that part of the traditional law which appears to be most connected with the new circumstances that have arisen; but in the process of thus fitting the law to a new state of things, there must inevitably be a large scope for latitude, whereby the law is moulded in accordance with the then prevailing mode of judicial thought, or even at times by the views on public policy entertained by particular judges.

The doctrines of Common Employment and of Identification considered as illustrations.

Two remarkable illustrations of this evolution of legal fictions are supplied by the doctrine of Common Employment and by the doctrine of Identification, both of which will be found discussed in the following pages. The first of these so-called doctrines, built up on legal assumptions or legal fictions, having once been enunciated, gradually, but surely, extended itself so as to encroach more and more

upon the rights of a servant or workman. The expansion of the definitions of a "fellow-servant" and of "common employment" by successive decisions became at last so irksome, that the Legislature interfered to abolish the doctrine, not entirely, but to a very large extent.

The doctrine of Identification was based upon an artificiality which had no foundation in truth, a legal fiction of fanciful ingenuity. By its operation, a person who had been injured in a collision between two vehicles was so "identified" with the driver of the vehicle in which he was riding, that he was deprived of any remedy against the proprietor of the other vehicle, if the driver of the one occupied by him had been guilty of any contributory negligence. In this instance, a judge-made law was finally followed by a judge-made repeal, and the doctrine was repudiated as unsound by judges of a more robust school of thought. There is, however, a difference to be noted in the history of these two legal fictions. The doctrine of Common Employment was more affected by the changed and changing conditions of employment; its incidence became, consequently, more and more ill-adapted to the new conditions, until its inapplicability and its harshness compelled the Legislature, by the force of public opinion, to interfere so as to ameliorate its operation. The doctrine of Identification, however, had a more restricted operation, and was in a less degree affected by a changed condition of things; and public opinion was not, therefore, to the same degree concentrated with regard to it. The judges who had evolved the doctrine of Common Employment, and had gradually engineered its extension, were subsequently bound by its far-reaching effect, and it became accepted as part of the common-law they had to administer. Their successors on the bench had no power to allay its aggressiveness, and a state of things had been judicially created, which it was impossible judicially to soften. The rude force of the Legislature could alone apply a remedy.

Definitions and their tendencies.

There is a natural craving for definitions in the study of most subjects, and perhaps especially so when the subject is a scientific one. If the various principles of law could be summarized as definitions, the resulting theoretical convenience would probably be greatly, if not entirely, dissipated by the practical difficulty of applying these definitions to particular cases of limitless variation. There is this inherent difficulty in the making of legal definitions: a definition to be true must be exhaustive; while the complexities and varieties of the circumstances of human affairs with which the definitions deal, are ever-changing and inexhaustible. A study of the Law Reports supplies a commentary on the dangers of definitions. Where they are intended to have a general application, rather than one limited to the particular circumstances under discussion, they are, for the most part, justly and naturally amenable to destructive criticism. Where they assume only to deal with the precise matter in hand, they are not, strictly speaking, definitions at all. Still, notwithstanding its dangers and difficulties, it would appear that the fascination of making definitions is irresistible, and even exceeds the delight of demolishing those which others have constructed. Such definitions as are used in this book are gathered from judicial utterances; but even then it is perhaps safer to regard them, not so much as being flawlessly exhaustive, but as compendious and convenient methods of summary authoritatively put forward. There is more difficulty and uncertainty created in the administration of the law by the multiplicity of definitions than, perhaps, arises from any other ascertainable cause. The point of view is diverted from the consideration of the facts to be dealt with, to the contemplation and construction of formulas. "There's more adoe to enterpret interpretations than to interpret things," said Montaigne, in dealing with a similar state of affairs that had arisen in the administration of the laws of his country in his times.

There is no branch of the law which has to deal more with variable and incalculable circumstances than that which treats of negligence; none which, in the nature of things, is more connected with new conditions constantly arising; and none, therefore, where there is greater difficulty in applying ascertained principles. The multiplicity of the reported cases dealing with a minute variety of circumstances which, with kaleidoscopic change, never again exactly recur, increases the difficulties instead of diminishing them. The desire to lean upon the prop of precedent induces a tendency to see similarities which are not wholly similar, and to ignore dissimilarities which are not immaterial. "What have our law-makers gained?" asks Montaigne—and his remarks have a singular freshness as applied to our own system of law—"What have our law-makers gained with chusing a hundred thousand kinds of particular cases, and adde as many lawes unto them? That number hath no proportion with the infinite diversity of humane accidents. The multiplying of our inventions shall never come to the variation of examples. Adde a hundred times as many unto them, yet shall it not follow that of events to come there be any one found that in all this infinite number of selected and enregistered events shall meete with one to which he may so exactly joyne and match it, but some circumstance and diversity will remaine that may require a diverse consideration of judgement. There is but little relation betweene our actions that are in perpetuall mutation and the fixed and unmoveable lawes. The most to be desired are the rarest, the simplest, and most generall."

Difficulties in applying the law to ever-changing circumstances.

One very eminent judge,<sup>1</sup> when dealing with the "Uncertainty" in the law, disputed interpretation of a commercial contract, repudiated the notion that there is any uncertainty in the law; adding that the uncertainty was to be found in the parties themselves, who had not clearly made up their minds about

<sup>1</sup> Lord Esher.



what it was they were entering into an agreement. Another learned judge<sup>1</sup> is reported to have said, and, it must be admitted, somewhat despondently, "There is no such thing as being right in law. The House of Lords are only right, because there is no Court above them to over-rule them." If it were true that there is no such thing as being right in law, it would follow that there must be such a thing as uncertainty in the law. Probably the truth lies somewhere between these two extreme propositions. It is seldom that any real uncertainty exists in ascertaining what the law is; the difficulty lies in applying the law to a particular set of facts. No doubt, in one sense, this makes the incidence of the law uncertain; no doubt, too, as the proper appreciation of facts is involved, and facts may in innumerable instances have a different significance to different minds, it might be said that there is no such thing as being right in law, because the accuracy of a legal decision depends upon the correct appreciation of the facts adjudicated upon. But to say generally that there is no such thing as uncertainty in the law is probably as loose a statement as to assert that there is no such thing as being right in law.

Discre-  
pant views  
in railway  
cases:  
their  
causes and  
effect.

One most noticeable instance of the change effected in everyday affairs operating upon the construction and interpretation of the law, is that which has been occasioned by railway transit and traffic. The discrepancy of judicial opinion in Railway cases, from the House of Lords downwards, as to what is, and what is not evidence of negligence, and as to what ought to be left for the determination of the jury, and what ought to be withdrawn from their consideration, is as remarkable as any to be found in the annals of our law reports. Two schools of thought in regard to these matters arose; one considering that questions arising in railway cases should be left to the judge, and as much as possible be withdrawn from the jury; and

<sup>1</sup> Huddleston, B.

the other protesting against this as a usurpation of the jury's functions. In 1876 we find Lord Esher referring to these opposite views, protesting against the curtailment of the functions of the jury, and asserting that the controversy had then been concluded.<sup>1</sup> Twelve years later, however, Fry, L.J., makes a further protest.<sup>2</sup> A jury had found that the accident to a plaintiff's horse had been caused by the omission of a railway company to erect a screen at their station, so as to hide the view of the engine from horses drawn up there; and the Court of Appeal held that the jury were not justified in so finding; and that there was no duty to erect such a screen, and therefore no negligence in not doing so. Fry, L.J., who was a member of the Court before which the appeal was heard, declared that if the matter had been left to his judgment without the influence of previous decisions, he would have said that there was evidence to justify the jury's finding, that it was the want of a screen which was the very cause of the accident. "But I cannot shut out from my mind," he continued, "that there has been a long series of decisions in which, under circumstances not unlike the present, judges have exercised great subtilty in narrowing the findings of the jury in similar cases. I do not say that the rights of the jury have been infringed, but that judges have held a tight rein over them. The reason of this was, that the judges felt that in the conflict before a jury between an individual who excited sympathy, and a railway company which excited none, the jury should be kept in hand with regard to the verdicts which they found. My mind is out of sympathy with many of these cases, and I believe that if left to myself my decision would not have been that of the great majority of judges who have tried similar cases. But I feel that the view now taken by my two learned brethren, Cotton and Lopes, L.JJ., is more in

<sup>1</sup> *Per* Brett, L.J., in *Robson's case* (*post*, p. 299).

<sup>2</sup> *Simkin's case*, 21 Q.B.D. at p. 460.

accordance with previous decisions. Consequently, I do not dissent from their opinion, but I give my assent with great reluctance."

It is obvious that this reveals a remarkable and far-reaching state of things. When those who administer the law become imbued with extraneous sympathies for one set of litigants or the other, or take it upon themselves to check motives that they conceive may have influenced juries in the exercise of their functions, or indulge in speculations as to what may be most for the advantage of the community, this "taking sides" inevitably colours their administration of the law. It forms another instance, and it must be admitted a dangerous one, of the moulding of the law by the judges to suit their own notions with regard to matters which lie outside their functions as the expounders and the administrators of the existing law. It is a more subtly dangerous method of dealing with the law, as in the opinion of the judge it ought to be rather than as it is, than is furnished by the instances where legal fictions are ingeniously built up. It is not interpreting the law so as to alter it, in which case the Legislature can act to remedy judicial interpretations that are found to operate injuriously; but it is allowing the administration of laws which are admitted to exist, to be misapplied or evaded by dint of specious reasoning; and to shape their operation so as to accord with the idiosyncrasies of particular administrators. To do this, refined subtleties and great ingenuity must be resorted to; and consequently many of the judgments in these railway cases exhibit a tortuous perversion of reasoning that becomes apparent the moment the artificial point of view is discarded.

Happily, discrepancies in these cases, arising out of this species of "taking sides," have now ceased to exist; and the discrepancies, which still obtain in the views taken by judges as to what is and is not evidence of negligence, are those that inevitably arise from the different

impression the same set of facts makes on different minds.

The student of the administration of the law must have been struck by the tendency which now exists, and has for some time been operating, to avoid the tyranny of technicalities, and to arrive at the real substance and truth of the matter in discussion. The administration of the law is subject to these veering waves of thought. At one time, a disposition to extend the importance of things technical dominates the minds of the judges; at another, the predominating mode of thought is to discard them as much as possible, and to throw off the shackles of precedent. Perhaps, however, the disposition to regard technicalities in the abstract as obstacles, rather than as aids to justice, is at times a little apt to become exaggerated. After all, technical rules form the foundation upon which the common-law is built, and represent probably in themselves the quintessence of legal learning. But whilst the requirements of the law sought extension in order to meet the growing complexities of affairs, technical rules remained fixed and inflexible; and irksomeness in their rigid applicability accordingly began to be felt. When this state of things first made itself manifest, the inconvenience was sought to be remedied under the Equity system of administering the law, and it became the avowed function of the Equity Courts to soften the rigidity of the Common-law. In the course of time, however, the means adopted by the Courts of Equity to perform this process became in themselves entangled by technical rules; and it was found that the Chancery judges evinced a disposition to flout one technicality, only to fall into the arms of another more favoured one. Then it was that the Common-law Courts made what was really a bid for business, by evading the rigidity of their rules in accordance with notions of equity of their own; and a rivalry sprang up between the two systems. At last, and within quite recent times, a wonderful

The abuse  
and use  
of techni-  
calities.

Conflict  
between  
the Courts  
of Equity  
and of  
Common-  
law.

The effect  
of the  
Judica-  
ture Acts.

thing was to happen. By the sheer force of an Act of Parliament the oil of equity was to become indissolubly mixed with the vinegar of the Common-law. Where the two refused to assimilate, the laws of Equity were (by statute) to prevail. Thus, by the Judicature Acts, a fusion of the two systems was to be forcibly inaugurated, while certain branches of the law were allocated to the Chancery Division. However successful this forceful mode became in remedying the scandal by which legal relief was obtainable under one system, and denied under the other; it could not, in the nature of things, succeed in amalgamating the different bases on which the two systems were reared. The technical rules applicable to each system still remain, if not intact, at least unmixed. The real and very substantial results that ensued were, however, to quicken the tendency to look at matters from other than a technical point of view; and the attitude by which the eye of the legal mind was unable to see the wood because of the trees, fell more and more into disuse and discredit. It is this repudiation of the technical view of looking at matters, rather than the dissipation of the technicalities of the science of law, that strikes the observer of the present methods of administering the law, and leads him to regard it, not quite accurately, as a tendency altogether to discard technical rules. As a fact, you cannot part altogether with such rules without destroying the whole scientific fabric. But what you can do, and what is being done, is to use the technical mechanism, not for the purpose of clogging the machine of justice, but to enable it to work efficiently. Just as there is no branch of the law where it is more necessary to make allowances for the changing conditions of modern life than that to which negligence relates; so in no department is the tendency to deal with technical rules so as to make them subserve the purpose of aiding justice more noticeable.

The result is that "hard cases" become less and less

frequent; and when they occur, judges do not hesitate to declare their dissatisfaction with the state of the law which occasions them. For instance, we find Lord Lindley declaring the law to be "very unsatisfactory," which technically prevents a person injured by the negligence of a Local Authority from obtaining redress if the negligent act is one of non-feasance merely, and not of mis-feasance.<sup>1</sup> So weighty a pronouncement by a judge of the highest repute and of great experience, would probably have led to an amendment of these conditions by legislative action, were it not that it is the main business of modern Parliaments not to legislate.

There is another very noticeable aspect of cases relating to negligence, and that is the human interest they involve. To be a victim of negligence, and even to be the perpetrator of a negligent act by ourselves, or, more frequently, by others for whose acts we are legally responsible, may happen to any of us almost as part of the ordinary curriculum. Hence, the law dealing with matters so intimate, possesses an interest sufficient to moisten the arid ground popularly supposed to be occupied by the study of the law. It is easy, no doubt, to make a subject forbidding by treating it as a mere catalogue of cases and footnotes; or by dumping the reader down amidst "a wilderness of single instances." It is, however, not so easy entirely to destroy the general interest attaching to most branches of the law of negligence; and there would seem to be no particular reason why the task should be attempted.

It is not inconceivable that with a subject so promising as that of negligence, a short treatise might be written, to which the practitioner might find it convenient to turn, and by which, at the same time, the general student of the laws of his country need not be repelled. It is not claimed that this conception has been realized in the compilation of this book, but perhaps something may have been gained by the writer having had it before him.

<sup>1</sup> See *Thompson v. Mayor of Brighton* (post, p. 98).

The elaborate and truly monumental work on negligence by Mr. Beven is one which must remain for a long time to come the standard and indispensable work upon this subject. The scale upon which that very learned work was planned enabled its author to treat at considerable length, not only subjects more or less cognate to the principal one, but also to deal with matters which cannot strictly be considered as belonging to the study of the law of negligence.

The scope  
of this  
book.

An attempt has been made to confine this book to that study; and where side-paths disclose themselves, the design has been either not to explore them at all, or only to the smallest extent. The general idea has been to examine and discuss somewhat fully the cases and judgments which present points of interest and importance, rather than to classify and exhaustively collect every case. No doubt, in thus endeavouring to bring the book within modest limits, matters may have been omitted, both in the treatment of the general subject and of its adjuncts, which either ought not to have been omitted, or might usefully have been included. In pursuing the difficult task of drawing the line somewhere, the writer is very conscious that he stands in need of generous indulgence; while he asks for his whole treatment of the subject that indulgence which the profession never withholds from a conscientious effort.

## PART I.





## CHAPTER I.

### *Actionable negligence and its "degrees."*

THERE are a great number of judicial definitions as to what constitutes negligence,<sup>1</sup> and the sum of them all appears to be as follows:—

Definitions of negligence.

Negligence consists in an act of omission or of commission by which there is a failure to perform the particular duty the occasion imposes; and becomes actionable when damage, brought about without wilful intention, results from the negligence as its "natural" or probable consequence.

The common law, influenced by the Roman law, for a long time professed to acknowledge different "degrees" of negligence. Lord Holt, in his celebrated judgment delivered in *Coggs v. Bernard*, 1 Sm. Leading Cases (11th ed., p. 173), in the course of classifying the various kinds of bailments, referred to "gross" negligence, "ordinary" negligence, and "slight" negligence, as different "degrees" of negligence. An examination of what is meant by the expression "gross" negligence shows that it was used ambiguously, and to signify different things. It was just as apparent that in some cases "gross" negligence was used to mean exactly the same thing as ordinary negligence. Mr. Justice Crompton, in *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, said that "for all practical purposes the rule may be stated

Whether there are degrees of negligence.

<sup>1</sup> See *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, per Alderson, B., at p. 784; *Heaven v. Pender*, 11 Q.B.D. 503, per Brett, M.R., at p. 507; *Kettlewell v. Watson*, 21 Ch. D. 685, per Fry, J., at p. 706; *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679, per Willes, J., 688.

to be, that the failure to exercise reasonable care, skill, and diligence is gross negligence." But how that definition differs in any way from what is understood by ordinary negligence has never been made clear. Then came the dictum of Rolfe, B., in *Wilson v. Brett*, 11 M. & W. 113, by which he declared "he could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet."

The indisposition to forego an expression which had been used by lawyers for a long period, still caused the controversy to continue whether there is such a thing as "gross negligence" apart from its vituperative sense; and even the judges who admitted that the term was incapable of being used as a definition, still clung to it as being a handy descriptive term more or less capable of being understood. (See *per* Lord Chelmsford, in *Giblin v. McMullen*, L.R. 2 P.C. at p. 336.) It has always been held that where there is no duty to discharge there can be no negligence, and probably the true view may thus be stated:—

**Suggested true view.** There are no varying degrees of negligence—such as "gross" negligence, and that which is not gross; but the duty imposed varies in different circumstances, and if that duty is not performed so as to observe or to carry out all that the particular duty imposes, an act of negligence results if injury thereby directly arises.

**Opinion of Montague Smith, J.** Montague Smith, J., in *Grill v. Gen. Iron Screw Colliery Co.*, 35 L.J.C.P. 321, at p. 331, says: "There is no doubt the expression 'gross negligence' is to be found in some of the decisions; but it is only one mode of expressing, perhaps, that in a particular case there is a less degree of care required than there might be in other cases."

**No such thing as negligence in the abstract.** Again, Bramwell, B., in *Degg v. Midland Ry. Co.*, 1 H & N. 773, at p. 781, says: "There is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place, or person." "It seems to us there can be no action except in respect of a duty infringed."

"The ideas of negligence and duty are strictly correlative," said Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. at p. 694, "and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody."

In *Grill v. Iron Screw Colliery Co.* (*supra*), affirmed L.R. 3 C.P. 476, the replication alleged that the collision between ships, by which the plaintiff's goods had been lost, was occasioned by the "gross negligence" of the defendants. The judge who tried the case did not ask the jury whether the defendants had been guilty of "gross negligence," but asked them whether the defendants had exercised due care in the conduct of their ship. This direction was held to have been a right one. Willes, J., said: "It is further complained that the L.C.J. misdirected the jury, because he made no distinction in this case between gross and ordinary negligence. No information, however, has been given us as to the meaning to be attached to gross negligence in this case, and I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett* (*supra*), that gross negligence is ordinary negligence with a vituperative epithet—a view held by the Exchequer Chamber: *Beal v. South Devon Ry. Co.*, 3 H. & C. 337.<sup>1</sup> Confusion has arisen from regarding 'negligence' as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and the absence of it is called 'gross negligence.' A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. 'Gross,' therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent, 'a want of due care

The  
decision in  
*Grill v.*  
*Iron Screw*  
*Co.*

<sup>1</sup> But see as to the assertion that the Exchequer Chamber agreed, *per* Lord Cranworth, *Giblin v. McMullen*, L.R. 2 P.C. at p. 336.

and skill in navigating the vessel,' which was again and again used by the L.C.J. in his summing up."

It is obvious that in the opinion of this learned judge there is no tangible distinction between ordinary negligence and gross negligence. It is terminology, as distinct from definition; and confusion necessarily arises when both are regarded as the same thing.

Montague Smith, J., in the same case, said: "The use of the term 'gross negligence' is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, *and it is more correct and scientific to define the degrees of care than the degrees of negligence.*"

Lord Denman's and Cresswell, J.'s, opinion.

Lord Denman said, in *Hinton v. Dibdin*, 2 Q.B. 661 (and Cresswell, J., approved of the remark in *Austin v. Manchester Ry.*, 10 C.B. 454): "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists."

Lord Chelmsford's criticism of Montague Smith, J.'s, view.

Lord Chelmsford, however, in criticizing Montague Smith, J.'s, expression of opinion, said, in *Giblin v. McMullen*, L.R. 2 P.C. at p. 337: "The epithet 'gross' is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility."

Lord Chelmsford's criticism examined.

With deference to this expression of opinion, it may be doubted whether it can be said that looking at the matter in this way is merely to shift the difficulty of ascertaining

what is the degree of negligence to that of defining the precise measure of the duty imposed. The difficulties are not of equal weight. The whole history of the use of terms of varying degrees of negligence shows that no definite and distinct meaning has attached to them; while the law has in many instances clearly enunciated the nature and degree of particular duties arising under different circumstances; and the jury have then to decide whether the facts before them fall within the duty defined. It is, indeed, the special province of the judge to define these duties as a matter of law, before it becomes possible for the jury to say that any negligence has occurred. For as an act of negligence implies a breach of some duty, the nature and extent of that duty must first be ascertained before it can be decided as a fact whether there has been any breach of it; and it would seem to follow that an act of negligence cannot be greater or less than is involved in the breach of the particular duty.

Once you have ascertained the nature of the duty imposed, you can determine as a matter of fact whether it has been discharged or neglected. You cannot do so before you have ascertained what that duty is; and it does not assist you in ascertaining it to classify the degrees of negligence. The American view, also, seems to be against the practicability of these distinctions. "What is common or ordinary negligence is more a matter of fact than of law." (Story on "Bailments," 9th ed., par. 11.) And the same author continues: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common-law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies

The  
American  
view.

according to circumstances, to whose influences the Courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation.”<sup>1</sup>

<sup>1</sup> And see *Storer v. Gowen*, 18 Maine, 177.

## CHAPTER II.

### *Accident—Intervening act of third party—"Natural or probable cause."*

It follows from all the definitions of negligence that where the injury is occasioned by a mere accident no action lies,<sup>1</sup> because no duty has been infringed.

Mere accident gives no cause of action.

In *Holmes v. Mather*<sup>1</sup> the defendant's horses ran away while being driven along the streets, and became unmanageable; but the driver could to a certain extent guide them, without being able to control them. He was doing all he could to avoid running into the plaintiff, when, in spite of his endeavours, she was knocked down by the horses and injured. It was held that no wrongful act had been committed. There was no negligence, and no wilful running into the plaintiff, and the injury arose accidentally. This case left open for decision a supposed set of circumstances, where a driver has to make a choice between two evils, and in order to avoid running over one person, or into one thing, runs over another person, or into another thing, deliberately electing to do the one act rather than the other; though it was intimated that in such a case the person who was injured could maintain an action. But whether if such a case arose, and the election was forced upon the driver by no fault of his own, and he, doing the best he can under the circumstances, elects to run into a shop rather than into some person, he would be liable for

<sup>1</sup> *Aston v. Heaven*, 2 Esp. 533; *Wakeman v. Robinson*, 1 Bing. 213; *Crofts v. Waterhouse*, 3 Bing. 319; *Holmes v. Mather*, L.R. 10 Ex. 261.



the damage done to the shop, remains for judicial decision. (See *per* Bramwell, B., *Hart v. L. & Y. Ry.*, 21 L.T., p. 263.)

The question arose in the case of *Manzoni v. Douglas*, 6 Q.B.D. 145, whether a *prima facie* case of negligence had been made, where the plaintiff by his witnesses showed that the injury had been caused by an inevitable accident. In spite of the efforts of the driver to control it, a runaway horse knocked down and injured the plaintiff. It was held there was no evidence of negligence to go to the jury.

The ordinary duty the law imposes.

The ordinary duty the law imposes is to act as a reasonable and prudent man would act, either in doing something or omitting to do something which a man, according to that standard, would do or would omit to do. No doubt there is an elasticity about this proposition, which, while it lacks scientific precision, at the same time affords a good working rule. Such terms as "ordinary prudence" and "average man" are necessarily loose. What is meant is, that a man must act as common experience dictates; and when a case goes to the jury, it is for them to say whether a litigant has so acted in the circumstances before them.

Neglect of means of knowledge.

It is to be noted that where a man would be responsible for injury arising out of a cause of mischief of which he has the means of informing himself, his neglect to avail himself of those means, so that in fact he remains ignorant of the cause of mischief, will not exonerate him from liability. It was held in *Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 93 (*post*, p. 93), that wherever knowledge of the existence of a cause of mischief would make a person responsible for the injury it occasions, he is just as much responsible when, by his culpable ignorance, its existence is unknown to him. When a man, too, has had notice of a particular source of danger which it is his duty to guard against, he does not show reasonable care if he makes no inquiry as to its existence and extent, or gives no warning of the danger. It is no defence in such

circumstances to say that the existence of the danger was in fact unknown to him: *The Queen v. Williams*, 9 App. Cas. 418.

Special circumstances create special duties, which are either more or less onerous than the ordinary duty imposes, and these will be more particularly considered under the general head of "Duties out of the Ordinary" (*post*, Part II.); but in any case it is true, as pointed out by Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. at p. 698: "To prove negligence, it is not enough to show that the defendant has been negligent to others; the plaintiff must show that there has been a breach of duty towards himself."

It will be seen that the definition of negligence as stated on page 15 contemplates a breach of duty by the defendant; but if the resulting damage is not occasioned solely by the defendant's act, but springs from the joint negligence of the defendant and the plaintiff, the plaintiff in that case has himself contributed towards the injury for which he claims compensation, and has no cause of action, because he is guilty of what is called "contributory negligence." (See *post*, "Contributory Negligence.") But the fact that the plaintiff has acted negligently does not excuse the defendant from the duty of exercising ordinary skill and care; so that if the defendant might nevertheless have avoided inflicting the injury or damage by exercising such care and skill, and has failed to perform that duty, he is not exonerated from liability by reason of the plaintiff's negligence.<sup>1</sup>

Where injury arises only partly from defendant's breach of duty.

Even if the damage is not occasioned solely by the defendant, but is brought about by the intervening act of a third party, the defendant is still liable for his own negligent act where it is the primary or effective cause of the injury, although another's intervention may have

Intervention of a third person.

<sup>1</sup> *Greenland v. Chaplin*, 5 Ex. 248; *Radley v. L. & N.W. Ry. Co.*, 1 App. Cas. 754.

brought about the immediate result: *Clarke v. Chambers*, 3 Q.B.D. 327.

Natural or  
probable  
cause of  
the injury.

In dealing with cases of this kind it has been laid down by the Courts that if the result of the defendant's original act of negligence was the "natural" or probable cause of the injury, then, notwithstanding that the injury would not have arisen unless the immediate cause had been brought about by the intervention of a third party, the defendant is liable. It does not seem possible to lay down any more definite rule than this, which is in itself sufficiently exact. The difficulty, however, occurs in its application. It is for the judge, where questions of remoteness of damage arise out of breaches of contract, to determine whether the damage is the necessary consequence of the breach, or the probable consequence, or whether it was in the contemplation of the parties when the contract was made: *Hadley v. Baxendale*, 9 Ex. 341. The last two questions are essentially questions of fact, as pointed out by Brett, L.J.;<sup>1</sup> and being questions of fact, there can be no unanimity with regard to them, although they are to be treated as questions of law. The same difficulty is felt in determining what is a natural or probable injury arising out of a tort. That which seems to one mind to be a natural or probable cause, strikes another mind differently. For instance, if a man leaves a dangerous machine in an unprotected state in a highway, and by reason of the machine being meddled with by a child passing along the highway it injures him, some minds might be inclined to think that the natural or probable consequence of so leaving a dangerous machine in a highway along which persons of all ages might lawfully pass, would be that some one might meddle with it, and thus bring about an accident; that the defendant's negligence in such case would not be so remote from the consequences ensuing as to prevent the child so injured from maintaining an action.

<sup>1</sup> *McMahon v. Field*, 7 Q.B.D. 591.

That, however, was not the view taken by the Court in *Mangan v. Atterton*, L.R. 1 Ex. 239. On the other hand, the judges who decided *Clarke v. Chambers*, 3 Q.B.D. 327 (*ante*, p. 24), in discussing *Mangan v. Atterton*, took a different view, and disagreed with the decision. *Mangan's case* also proceeded on the ground that the plaintiff was a tort-feasor, a consideration afterwards dealt with (see *post*, "Liability of Trespassers"); but there was besides the distinct decision that there was no negligence on the defendant's part.

The facts in *Mangan v. Atterton* were, that the defendant had left, in a public market-place, an oil-cake crushing machine. It was entirely unprotected; the machine had not been thrown out of gear, nor was the handle by which it was worked secured or fastened in any way. The plaintiff, a boy of four years old, on coming away from school with his brother, aged seven, and some other boys, stopped by the machine, and one of the boys turned the handle. The plaintiff then, being told to do so by his brother, placed his hand on the cogs of the wheel, and three of his fingers were crushed. It was held by the Court of Exchequer that there was no negligence on the part of the defendant; and if there was negligence, it was too remote.<sup>1</sup> How differently these facts struck the minds of the judges in *Clarke v. Chambers* is seen from the words of Cockburn, C.J., in delivering the judgment of the Court, who, dealing with *Mangan v. Atterton*, after saying that the Court did not acquiesce in the decision as to negligence, added: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to

*Mangan's case* disapproved in *Clarke v. Chambers*.

The facts of *Mangan's case*.

<sup>1</sup> See also *Hughes v. Macfie*, 33 L.J. Ex. 177. It was also held in the second place that, as the injury was caused by the boy's own act, and he was a trespasser, the defendant was not liable. This is afterwards discussed under the head, "Liability to Trespassers" (Chap. xvii.).

any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

*Clarke v. Chambers*: dangerous instruments.

*Clarke v. Chambers (supra)* was a case where the defendant had unlawfully placed a dangerous instrument—a barrier armed with spikes—on a carriage-way. Some one removed the obstruction, and put it, in an upright position, across the footpath. The plaintiff, passing along this footpath on a dark night, injured his eye against one of the spikes. It was held that the defendant was liable to the plaintiff in respect of the injury sustained, because he had unlawfully put a dangerous instrument in the road; notwithstanding the fact that the immediate cause of the injury was the intervention of some third party in removing the instrument from the carriage-way to the footpath. The natural or probable result of the defendant's proceeding was thus dealt with in the course of the judgment: "A man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising

their right of way, and that if he neglects to do so, he is liable for the consequences."

Thus, a man is bound to exercise the foresight of a reasonable person in respect of the probable events that may ensue from his wrongful act. What results should be reasonably anticipated so as to bring them within the natural and probable results of his negligence are incapable of precise definition, but must depend upon the circumstances, and on the reasonable view taken of those circumstances.<sup>1</sup>

A man is answerable for the probable consequences of his wrongful act.

An early and often-quoted case of the kind is that known as the squib case (*Scott v. Shepherd*, 3 Wils. 403). The defendant threw a lighted squib into a market-house, where there were several people. It fell upon a standing, and the proprietor in self-defence threw it to another part of the market-house, where it fell upon another standing, whose owner again threw it to another part of the market, and in its course it struck the plaintiff, exploded, and put his eye out. The defendant was held liable, although the squib would not have injured the plaintiff unless for the intervention of a third person. The whole chain of circumstances leading up to the injury had been set in motion by the defendant's original act; and what happened after the defendant threw the squib in this way was that which might naturally and probably occur as the result of his wrongful act.

The squib case.

In another case (*Lynch v. Nurdin*, 1 Q.B. 29) the defendant's servant left his cart and horse standing unattended in the street. The plaintiff, a child of seven, was getting into the cart, when another boy made the horse move on; the plaintiff was thrown down, and the wheel of the cart going over his leg, fractured it. Lord Denman, in the course of his judgment, said: "It is urged that the mischief was not produced by the mere negligence of the servant, as asserted in the declaration, but at most by that negligence in combination with two other active causes, the

*Lynch v. Nurdin.*

<sup>1</sup> *McDowall v. G. W. Ry.*, 1903, 2 K.B. 331.

advance of the horse, in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both, or either of the two, but unquestionably against the first."<sup>1</sup>

Cart  
left in  
street un-  
attended.

There is a similar case reported in *Illidge v. Goodwin*, 5 C. & P. 192, where Tindal, C.J., said: "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done."

Motor-  
cars.

There would seem to be no reason why the same legal consequences would not follow if a motor-car, left unattended in a street, and being meddled with by some one, were set in motion and caused injury or damage to another.

Probable  
cause of  
injury :  
leaving  
dangerous  
instru-  
ments  
about.

Another case which well exemplifies the "probability" of injury flowing from the act of negligence is supplied by *Dixon v. Bell*, 5 M. & S. 198. There the defendant left a loaded gun with another man, and sent a young girl to him to fetch it away, with a message asking him to first remove the priming. The man did, as he thought, remove it, but, as it turned out, not effectually. The girl brought the gun home, and thinking it would not go off as the priming had been removed, pointed it at the plaintiff's child and pulled the trigger. The gun went off and injured the child, and the defendant was held liable. By leaving the gun without drawing the charge, or himself seeing that the priming had been properly removed, "the instrument was left in a state capable of doing mischief;" and the law held the

<sup>1</sup> And see *Jewson v. Gatti*, 2 Times L.R. 381, 441; *Harrold v. Watney*, 1898, 2 Q.B. 320.

defendant liable for the consequences, though the intervention of a third person brought about the immediate injury.

So, again, where a road, which has been diverted under statutory powers, is left in such an unprotected state at the point of divergence that there is nothing to prevent a person continuing along the old road, which is in an unsafe condition, and so injuring himself; the person exercising the statutory right to divert is bound to take reasonable means of protecting the public, apart from any obligation to fence.<sup>1</sup> It was a natural anticipation that if the old road was left open, people would continue to go along it.

It is to be observed that where the defendant's negligence is the primary and effective cause of the plaintiff's damage, the defendant will be responsible for the whole of the damage, though it may have been augmented by the wrongful act or the negligence of a third party. The Middle Level Commissioners were by their Act to construct a cut with proper gates and sluices to keep out the waters of a tidal river, and also to make a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and always to keep it open. They negligently constructed the gates and sluices, and as a result the river flowed into the cut, and bursting its western bank, flooded the adjoining lands. The plaintiff on the east of the cut closed the lower end of the culvert, which prevented the flooding of his lands; but the occupiers on the west side, thinking this would be injurious to them, opened the culvert, and so let in the waters on to the plaintiff's land. It was held that the commissioners were responsible for the entire damage thus caused to the plaintiff's land: *Collins v. Middle Level Commissioners*, L.R. 4 C.P. 279.

In this case the damage was the result jointly of the defendant's negligence and of the wrongful act of the third

<sup>1</sup> *Hurst v. Taylor*, 14 Q.B.D. 918.



party. And, in the same way, where the accident is caused by the negligence of the defendant together with somebody else's negligence, the defendant will not be exonerated where his negligence is the effective, though it may not be the immediate, cause of the injury sustained. A gas company had contracted to supply the plaintiff with a service pipe to convey gas into his premises, and an escape of gas occurred because the service pipe was defective. The plaintiff called in a gas-fitter, who negligently went with a lighted candle to find the cause of the escape, with the result that there was an immediate explosion; and the plaintiff's premises were damaged. The plaintiff was, on these facts, held entitled to recover against the gas company, who were not relieved from liability by the negligence of the gas-fitter: *Burrows v. March Gas Co.*, L.R. 7 Ex. 96.<sup>1</sup>

Whether the original negligence is the effective cause of the injury is a question of fact.

It has also been held in another case<sup>2</sup> that there is no rule of law which exonerates a master from liability for the negligence of his servant, whereby an opportunity has been afforded for a third person to do a wrongful act which immediately produces the injury complained of. It is always a question of fact whether the original negligence was an effective cause of the damage. The facts of that case were, that the defendant employed a man to drive a cart, with orders not to leave it, and a lad to go in the cart and deliver parcels. The driver, contrary to his orders, left the cart with the boy in it. While the driver was absent, the lad drove on and came into collision with the plaintiff's carriage. It was held that the driver's negligence in so leaving the cart was the effective cause of the damage, and the defendant was liable, the master being answerable for his servant's negligence. He had practically left the cart unattended. As he knew that the lad was not to interfere with the driving, he ought to have anticipated that if he

<sup>1</sup> And see *Mowbray v. Merewether* (post, p. 34); and *Lilley v. Doubleday*, 7 Q.B.D. 510.

<sup>2</sup> *Engleheart v. Farrant*, 1897, 1 Q.B. 240.

left the cart with the boy in it some accident might happen. In the course of the judgments, the case of *Mann v. Ward*, 8 Times L.R. 699 (at all events as reported), was considered to have been wrongly decided. Lopes, L.J., took occasion to say: "It is impossible to reconcile the various decisions with regard to negligence; and the reason is that fact and law are so mixed up in them, that they are frequently decisions rather on the facts than on the law, and the variety of facts involved is infinite."

The subsequent case of *McDowall v. G.W. Ry.*, 1902, 1 K.B. 618, was decided on the same principle; but it shows also that where a defendant leaves a thing in a position, which, though safe when he leaves it, he has reason to suppose may be rendered unsafe by the unlawful intervention of third parties; and has at the same time the means (to which he has not resorted) of securing the thing so as to render such intervention innocuous, he is guilty of negligence. The defendant company had left some railway trucks on a siding on a down grade, which might have been secured by the catch-point on the siding. For their own convenience in regulating the traffic they did not make use of the catch-point, but screwed down the brakes and left the trucks so that they would be safe if not interfered with. But the defendants also knew that boys were in the habit of trespassing on this siding and interfering with the trucks. This, in fact, happened. Some boys did trespass on the siding, unscrewed the brakes, and detached a truck, with the result that it ran down the incline and injured the plaintiff, who was lawfully passing along the highway over the level crossing. With this knowledge that boys trespassed on the siding, they ought to have anticipated such a result if the trucks were left unsecured by the catch-point. This was held by Kennedy, J., to constitute negligence on their part, and to have been the effective cause of the plaintiff's injury, and to justify the verdict of the jury to that effect. He considered these facts were within

*McDowall's case forms another instance of reasonable anticipation.*

If the damage is not the natural consequence of defendant's act, it will be too remote.

*Engleheart's case* (ante, p. 30), and also *Lynch v. Nurdin* (ante, p. 27).<sup>1</sup> But the damage which arises from the wrongful act of a third person must be such as could reasonably be expected to follow from a defendant's negligent act; in other words, the natural and probable consequence of the defendant's conduct, or the damage would be too remote to be recovered: *In re United Service Co., Johnston's claim*, L.R. 6 Ch. 212. In the course of his judgment in that case James, L.J. (p. 218), put the following case: "Suppose the bailee of a key carelessly allowed the key to fall into the possession of a man who committed a burglary, and by means of that key opened a box which contained valuable property. It is scarcely possible to hold that the negligence of the bailee with regard to the key would be followed by responsibility for the loss of every article obtained by the burglar through the instrumentality of the key." [And see *Halestrap v. Gregory*, 1895, 1 Q.B. 561.]

There is a case<sup>2</sup> of remoteness of damage arising out of a breach of contract at which a curious result was arrived. A railway company, instead of taking the plaintiffs one wet night to their destination, turned them out at another station, where they were unable to get any conveyance, and were obliged to walk six miles to their home. In consequence of this wet walk, one of the plaintiffs, a lady, caught cold; and it was held that such damage was too remote to be recovered. Why a lady's catching cold should not be a probable cause of having to walk six miles on a wet night, it is difficult to determine.

A different result was, however, arrived at where a horse-dealer, in breach of his contract with the plaintiff, turned out the plaintiff's horses, and exposed them to the weather, and they consequently caught cold.<sup>3</sup> That was

<sup>1</sup> The C.A. took a different view of the facts and reversed the case: 1903, 2 K.B. 331.

<sup>2</sup> *Hobbs v. L. & S.W. Ry.*, L.R. 10 Q.B. 111.

<sup>3</sup> *McMahon v. Field*, 7 Q.B.D. 591.

held not to be too remote a head of damage, and the plaintiff was allowed to recover in respect of it. To distinguish one case from another similar one which is not approved of, presents (as Brett, L.J., once himself remarked<sup>1</sup> when dealing with a distinction which had been drawn by Bramwell, L.J.) no difficulty to an ingenious mind. And Brett, L.J.'s, ingenuity was called into play to distinguish this case of a horse catching cold, from that of *Hobbs's case*, where the lady caught cold. The ground of distinction he discovered was, that people might possibly walk home on a wet night without catching cold, but horses turned out as these were would be sure to do so; an ingenious distinction, in which the L.J. himself declared he did not see much difference, and which seems to give the go-by to the question of reasonable probability.<sup>2</sup>

A somewhat remarkable state of things arose in *Kiddle v. Lovett*, 16 Q.B.D. 605. The defendant put up for the plaintiffs, under a contract, a suspended platform to enable their workmen to paint a house. It was insecurely fastened by the defendant, and in consequence hurt one of the plaintiffs' workmen. The workman brought an action under the Employers' Liability Act against the plaintiffs for the injuries he had sustained, and the plaintiffs settled the action by paying him £125. He might have maintained an action against the defendant under the principle of *Heaven v. Pender*,<sup>3</sup> but elected to sue the plaintiffs. It was clear that the defendant was bound under his contract to erect a platform which was reasonably fit for the purpose for which it had been supplied, and as he had not done so, he was liable to the plaintiffs in respect of such damage as they had sustained in consequence of his breach. The plaintiffs in their action sought to recover against the defendant as damages the £125 they had paid to their

<sup>1</sup> *Cohen v. S.E. Ry.*, 2 Ex. D. at p. 264.

<sup>2</sup> See also *Lilley v. Doubleday*, 7 Q.B.D. 510; and *Sneesby, v. L. & Y. Ry.*, 1 Q.B.D. 42 (*post*, p. 41).

<sup>3</sup> See *post*, p. 71.

The distinction between *Kiddle v. Lovett* and *Mowbray v. Merewether*.

workman. It was held by Denman, J., that they could not do so. The ground of the decision was, that as they had not themselves, as a fact, been guilty of any negligence towards their workman, they had not incurred any liability to him, and could not therefore recover from the defendant a sum they had paid without any legal liability to do so.

Where, however, there has been negligence by the employer towards his workman, so that the latter has a cause of action against the employer; compensation properly paid by him to the workman can be recovered in an action brought by the employer for breach of warranty (express or implied) against a defendant, who had agreed to supply proper appliances for the use of the employer's workmen: *Mowbray v. Merewether* (1895), 1 Q.B. 857; 2 Q.B. 640. It was there contended for the defendant that as the plaintiff (the employer) had been guilty of negligence as against the injured workman in not himself examining a defective chain supplied by the defendant, the injury caused to the workman was not solely due to the fact that the defendant had supplied a defective chain, but to that circumstance, and the plaintiff's negligence in addition. But as the plaintiff owed no duty to the defendant to examine the chain, which had been supplied to him as fit for the purpose for which it was used, there was no negligence, as between him and the defendant, in not examining it; and the fact that the plaintiff had failed to discharge a duty he owed to his workman, did not absolve the defendant from his breach of contract with the plaintiff. The workman's injury, it was held, was a reasonable and natural consequence of the defendant supplying the defective chain; and the compensation which the plaintiff had paid his workman in the settlement of an action properly brought against him under the Employers' Liability Act, was a damage which was recoverable, and was not too remote.

Damage too remote: *Coultas's case* considered.

Another instance of damage being too remote, as not arising naturally or reasonably from the act of negligence,

occurred in the case of *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222, decided in the Privy Council ; and it is submitted that the decision in that case is an unsatisfactory one. The plaintiff there, a lady, sustained personal injuries from a severe shock (which, according to the Victorian Reports, occasioned a miscarriage), brought about by the gate-keeper of the defendant railway company negligently inviting her to drive over a level crossing when it was dangerous to do so ; and a collision between the trap in which she was, and a passing train, was only just narrowly avoided. It was held—without deciding that actual “impact” was necessary in order to make the action maintainable—that injury arising from mere sudden terror without any physical injury, but occasioning a nervous or mental shock caused by fright in seeing the train approaching upon her, was not a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. It was pointed out in the course of the decision that to extend liability for such consequences would be to go further than had ever been gone before ; and in every case where an accident arising through negligence caused a severe nervous shock, a claim for mental injury might be made, and a wide field opened for imaginary claims.

It hardly appears a sufficient answer to a *bonâ fide* case, to say that similar cases might be imaginary ; and it is difficult to understand why the shock from which the injuries arose was not the natural or probable result of the gate-keeper’s particular act of negligence.

Lord Esher, M.R., in *Pugh v. L.B. & S.C. Ry.* (1896), 2 Q.B. 248, where the question was whether physical incapacity arising from nervous shock due to a fright was within the terms of a policy, incidentally considered the decision in *Coultas’s case* as open to question ; and Wright, J., in *Wilkinson v. Downton* (1897), 2 Q.B. 57, commented on it unfavourably.

The question, however, recently arose for decision in *Dulieu’s case*.

the case of *Dulieu v. White & Sons* (1901), 2 K.B. 669, before Kennedy and Phillimore, JJ., who were not bound by the case in the Privy Council. Both the learned judges arrived at the same result, but by different modes of reasoning; and the judgments are, perhaps, of still greater value by reason of the differences of opinion they exhibit.

The case was argued on the point of law arising on the pleadings. The plaintiff, the wife of a licensed victualler, was behind the bar of her husband's public-house, she being then pregnant, when the defendant's servant negligently drove a pair-horse van into the public-house bar. The van did not, in fact, touch her; but, being reasonably apprehensive of injury to herself from the occurrence, she sustained a severe nervous shock, became seriously ill, and subsequently gave birth to a child prematurely. For this she claimed damages. There was a further head of damage (which was, however, abandoned on the argument, it being admitted not to be tenable) in that by reason of the shock the child was born an idiot. It was held that if at the trial the plaintiff proved, that the nervous shock was directly occasioned by the reasonable apprehension of danger to herself caused by the defendant's negligence, an action for negligence would lie.

Kennedy, J., going through the cases—including some Irish and American decisions—came to the conclusion that he was unable to follow *Coultas's case* (13 App. Cas. 222). Phillimore, J., notwithstanding his acquiescence in the judgment pronounced, did not consider it necessary to differ from the decision in *Coultas's case*, though he thought he agreed with it for reasons other than those which were

The duty owed by a driver to a man out-of-doors, and to one indoors, considered prominent in the judgment. The judgments of both of the learned judges deserve studying to appreciate the point of divergence, which appeared to arise on the consideration of what the duty was which the defendant's servant owed to the plaintiff. Kennedy, J., thought there could be no question about it, and thus states it: "The driver of a

van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway, or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property. His legal duty towards all appears to me to be practically identical in character and in degree. . . . The wayfarer in the street, as it seems to me, has in law as much right of redress if he is injured in person or in property by the negligence of another, as the man who is lawfully sitting on a side-wall or in an adjoining house. . . . The legal obligations of the driver of horses are the same towards the man indoors as to the man out-of-doors."

Phillimore, J., drew a distinction between the duty owed to the man indoors and that owed to the man out-of-doors, inclining to think that a man in the streets must take his chance of being placed in a position by which he might incur a nervous shock; and upon that, he was led to think that *Coultas's case* was rightly decided. "It is not certain," he said, "that as between people travelling on highways there is any duty so carefully to conduct yourself or your vehicle as not to frighten others. It is a duty so carefully to conduct yourself or your vehicle as not to cause collision or some other form of direct physical damage. . . . There are dangers sometimes from the traffic at Charing Cross which might frighten not only an inexperienced and elderly countrywoman, but an experienced and cool citizen, the ideal *vir constans*, for whom *ἐμπειρία* makes *ἀνδρεία*. But if physical consequences were induced by terror so produced, it may be that there would be no cause of action. . . . It may be (I do not say that it is so) that a person venturing into the streets takes his chance of terrors. If not fit for the streets at hours of crowded traffic, he or she should not go there."

Even from the rightly high standpoint of a judge,



however, we can hardly expect to find in the man in the street—

“Justum et tenacem propositi virum

Si fractus illabatur orbis

Impavidum ferient ruinæ.”

Such serene imperturbability, sufficiently rare to be the subject of eulogy in Horace's days, is still scarcely an everyday standard to be met with in the crowded streets of London. “But if a person being so fit, either permanently or temporarily stays at home, he or she may well have a right to his or her personal safety, giving to these words the meaning given by my brother, Wright, J. (see *Wilkinson v. Downton* (1897), 2 Q.B. 57); and wilfully or negligently to invade this right, and so induce physical danger, may give a right of action.”

Of course, in one sense, a man “takes his chance of terrors” wherever he may be; but why he cannot obtain redress when injured by terror occasioned by an unnecessary and negligent act, does not appear clearly from Phillimore, J.'s, judgment.

It is clear, therefore, that if the accident had occurred in the street instead of in the house, Kennedy, J., would still have held there was a cause of action; while Phillimore, J., on the other hand, would have found there was no cause of action—or, at least, would not have been satisfied that there was.

Now, Kennedy, J., carefully limits his proposition as to a cause of action arising through shock, to those cases where the shock is sustained by a reasonable apprehension by the plaintiff of danger to himself. Neither in the case where a man receives a shock causing physical injury by witnessing an accident to some one else (see *Smith v. Johnson & Co.*, cited by Wright, J., in *Wilkinson v. Downton*, *supra*), nor in the case where his apprehension of danger to himself is unreasonable or fanciful—a question

of fact for the jury to decide—would he allow a cause of action to have arisen. This limitation would seem to cover the cases put by Phillimore, J., both of the “inexperienced countrywoman” and of the “vir constans,” unless an impossibly high standard of cool composure is taken. But as that learned judge appeared to acquiesce in the limitations so laid down, it seems somewhat difficult to follow the distinction he draws between the duty owed to the man indoors and to the man out-of-doors, more especially when it is pressed to the point of agreeing with the decision in *Coultas's case*, which was one of a plaintiff out-of-doors. If the learned judge merely meant that one is not justified, in a crowded street, where danger is a more or less normal condition, in arriving at the conclusion that danger is really threatening, as readily as might be the case under conditions of less difficulty; that again only involves the question of fact, whether the fear causing the shock was reasonably entertained. It may be that the learned judge was only intending to point out that it is more difficult under conditions of stress to determine, on the spur of the moment, whether danger really threatens; and that unless the fear is a reasonable one, no cause of action arises. But it is not apparent in that view—which was also the view of Kennedy, J.—why the decision in *Coultas's case* should be supported. The determination of the question of fact whether the fear was reasonably entertained, must of course depend upon the surrounding circumstances. One can hardly conceive circumstances more reasonably calculated to bring about a nervous shock than those proved in *Coultas's case*.

Kennedy, J., in pointing out the necessity of showing that where ill effects follow at some later date from the act of negligence, they must be shown to be directly due to that act, thus defines remoteness of damage: “Remoteness, Kennedy, J.’s definition of “remoteness.” as a legal ground for the exclusion of damage in an action of tort, means, not severance in point of time, but the

absence of direct and natural causal sequence—the inability to trace, in regard to the damage, the *propter hoc* in a necessary or natural descent from the wrongful act.”

*Jones v.  
Boyce.*

It had already been held by Lord Ellenborough, so long ago as 1816, that where a man on a coach was, by the negligence of the driver, placed in such a position that it was a reasonable thing for him to jump off, and in so doing he broke his leg, he had a right of action; although, as a fact, the coach did not overturn, and probably if he had kept his seat, he would not have sustained any injury. Lord Ellenborough, in addressing the jury (*Jones v. Boyce*, 1 Stark. 493), told them that to enable the plaintiff to sustain an action it was not necessary that he should have been thrown off the coach; it was sufficient if he was placed, by the defendant's misconduct, in such a situation as obliged him to adopt the dangerous expedient of jumping as a prudent precaution for the purpose of self-preservation. The negligence in this case was occasioned by the use of a defective coupling-rein, which breaking, rendered one of the leaders restive and uncontrollable. The jury were told to determine “whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted.”

The same principle was exhibited in deciding that the plaintiff had a right of action where the defendants had negligently left a ship in the fair-way without lights, and the plaintiff's vessel, in trying to avoid a collision with it, was driven against a wall and damaged.<sup>1</sup>

In *Jones v. Boyce*, then, we have a decision recognizing the liability of a negligent person, whose negligence places the plaintiff in a position of difficulty from which he has to extricate himself on the spur of the moment, and in doing so injures himself. The jury, too, were told that they must find that the step taken by the plaintiff was one which, in the circumstances, a prudent man might have

<sup>1</sup> *The Industrie*, L.R. 3 A. & E. 303.

taken, before they could bring in a verdict for him. This nearly presents the same points for consideration as the question left for the jury in *Dulieu's case*, i.e. whether an ordinary person might have reasonably suffered a nervous shock or fright from the state of things brought about by the defendant's negligence; though it falls short of deciding the precise point with which *Coultas's case* and *Dulieu's case* was concerned.

There was another case, decided in the Court of Appeal (*Sneeshy v. L. & Y. Ry.*, 1 Q.B.D. 42), where consequential damage, the result of cattle taking fright and becoming beyond their drover's control owing to a railway company's negligence, was held not to be too remote. The plaintiff's herd were being driven along a road which crossed a siding on the defendants' railway. While the cattle were crossing the siding, the defendants' servants negligently sent some trucks down an incline into the siding. This separated the cattle from the drovers, frightened them, and they rushed away. Six of them were afterwards found dead on another part of the railway. They had got on to the line there by running through a garden a quarter of a mile from the crossing, the fences of the garden being defective. It was held that as the defendants had been guilty of negligence which caused the drovers to lose control over the cattle, and the cattle to become frightened (and it was no defence to say that if the garden fence had not been defective no injury would have occurred), the damages were not too remote. Though this case is mainly an illustration of the principle that a person is liable for all the natural consequences of his wrongful act, yet it shows that to cause cattle to take fright by an act of negligence is a cause of action when damage ensues, although the injury does not ensue immediately in point of time upon the negligent act, and is not inflicted by the negligent use of the particular instrument which induced the panic.

Injury to cattle negligently caused to take fright is not too remote.

So also in the cases of *Harris v. Mobbs*, 3 Ex. D. 268;

*Wilkins v. Day*, 12 Q.B.D. 110; and *Brown and Wife v. Eastern & Midlands Ry. Co.*, 22 Q.B.D. 391, the injuries to the plaintiffs were caused by animals being subjected to a fright by the defendants' wrongful act.

In these cases—*Jones v. Boyce* (*ante*, p. 40), *Sneesby v. L. & Y. Ry.* (*ante*, p. 41), *Harris v. Mobbs* (*supra*), *Wilkins v. Day* (*supra*), and *Brown's case* (*supra*)—physical injuries ensued apart from such as a nervous shock might produce. *Dulieu's case* shows, that negligently to induce a nervous shock, constitutes a cause of action if injurious physical effects result from the shock, which are not tangible physical injuries in the ordinary sense; though it must not be forgotten that, in the view of one of the judges who decided that case, a cause of action arises only in the case of a person who sustains such a shock when sitting indoors.

But in *Wilkinson v. Downton* (1897), 2 Q.B. 57 (*ante*, p. 38), which was not a case of negligence at all, but a tort in the nature of a trespass, Wright, J., held, that where the plaintiff was rendered seriously ill from a nervous shock she sustained, because the defendant by way of a "practical joke" told her, wishing her to believe it, that her husband had met with a serious accident, a good cause of action arose.

If you break my bones by your wrongful act; or injure my health by wrongfully giving me a nervous shock or fright; in both cases I suffer from your wrong-doing. It was not clear upon what principle you should escape liability in the latter case; and *Dulieu's case*, if it has not entirely settled the point, has gone a long way to show that that which is reasonable in principle is also sound in law.

The rule of law when a person is wrongfully placed in

It has already been pointed out that it is for the jury to decide whether the fright has been sustained under reasonable conditions; and in those cases where the plaintiff has suffered physical injuries from taking a step induced by being wrongfully placed in a position of difficulty, the

rule has been laid down in *Adams v. L. & Y. Ry.*, L.R. 4 <sup>a position of difficulty.</sup> C.P. 739, by Brett, J., as follows: "I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience." The learned judge and the Court, in stating that rule, discarded the idea that there must be actual peril in order to justify a person in attempting to get rid of the inconvenience; but the amount of risk involved in so doing must not be disproportionate to the inconvenience that is being sustained. This rule was applied in *Adams's case*, and was subsequently considered by Brett, J., himself, and some of the other judges who were parties to the judgment, in *Gee v. Metropolitan Ry.*, L.R. 8 Q.B. 161, to have been wrongfully applied, though the rule itself was considered to be a sound one. It will be seen that this rule is in effect that which was laid down to the jury by Lord Ellenborough in *Jones v. Boyce*, 1 Starkie 493 (*ante*, p. 40). If, therefore, the risk deliberately incurred to avoid a danger or an inconvenience wrongfully imposed is an unnecessary one—one that cannot be reasonably justified under the circumstances—the jury cannot find for the plaintiff, and the plaintiff will have no cause of action.

In *Romney Marsh (Bailliff) v. Trinity House Corporation*, L.R. 5 Ex. 204, Kelly, C.B., said: "The rule of law is, that negligence, to render the defendants liable, must be the *causa causans*, or the proximate cause of the injury, and not merely a *causa sine qua non*;" and in *Greenland v. Chaplin*, 5 Ex. 243 (*ante*, p. 23), Pollock, C.B. (at p. 248), said: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would

*Hill v. New River, and Sharp v. Powell*, considered together.

have anticipated." While such consequences would be too remote, the difficulty really lies in applying that rule; and it is submitted that it was not rightly applied in *Coultas's case*, which has already been discussed. The difficulty is further illustrated by placing in juxtaposition the cases of *Hill v. The New River Co.*, 7 B. & S. 308, and *Sharp v. Powell*, L.R. 7 C.P. 253. In the former case the defendants created a nuisance in a highway by allowing a stream of water to spout up in the road, opened and unfenced. The plaintiff's horses passing along it with his carriage, took fright at the water spouting up, and swerved to the other side of the road. It happened that an open ditch had been left in the road which some contractor, who was making a sewer, had improperly left unfenced and unguarded; and owing to this ditch being thus left unfenced, the horses fell into it, and injured themselves and the carriage. For the defendant it was urged that if any one was liable it was the contractor; but the Court held the company liable. It was no answer to say that if it had not been for the contractor's negligence the injury would not have occurred; nor does it avail to say that the fortuitous circumstance that some other person may also have been guilty of negligence is not a possibility that could have been foreseen or reasonably anticipated. If persons leave a nuisance on a highway, it is a natural or probable consequence that some one passing along it may thereby sustain an injury; and this is a risk which any one must take who is guilty of such negligence. (See also *Sneesby v. L. & Y. Ry. Co.* in C.A. 1 Q.B.D. 42 (*ante*, p. 41).) How far, however, that risk is to extend along the chain of circumstances bringing about an accident, so as to make the defendant liable for his initial wrong-doing, is a matter which must be determined with reference to the circumstances of each particular case, upon the application of the principle, which cannot, perhaps, be more definitely enunciated, that the actual injury must be a result which flows

naturally—that is, with reasonable probability—from the defendant's negligence. Placing *Sharp v. Powell* (*supra*) by the side of *The New River Co.'s case*, where it was held that the action would not lie, because the injury, although arising from the defendant's unlawful act, could not have been reasonably expected to follow from it, let us see how the principle works out. The defendant in that case had, in breach of the Police Act, washed a van in the street, and allowed the water used for the purpose to flow down a gutter towards a grating leading to a sewer about twenty-five yards away. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and then froze. There was no evidence that the defendant knew that the grating was obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. The Court held that this was a consequence too remote to be attributed to the defendant's wrongful act. Yet it might not unreasonably appear to some minds, that if a person uses water in a street (in this instance an unlawful act) on a frosty day of extreme severity, it is highly probable that in the ordinary course the usual outlets for the water might be obstructed by ice; and that an ordinarily prudent person might reasonably anticipate this. The judgment proceeded upon the ground that the defendant was not aware that the grating was stopped up; and Bovill, C.J., thought the reasonable inference to draw was, *that if the drain had not been stopped, and the road had been in a proper state of repair, the water would have flowed away without causing any injury to any one.* But in *Hill v. The New River Co.* (*supra*), and in *Sneesby v. L. & Y. Ry. Co.* (*supra*), it was held (as we have already seen) to afford no answer to the defendant's liability, that the accident would not have happened unless some other defect had also contributed to it; and there was not, in either of those cases,



any evidence that the defendant was aware of those defects. The question, moreover, still remains, whether the defendant in *Sharp v. Powell* ought not, as a prudent man, to have anticipated that which actually happened; and although the Court thought not, it would not be possible to regard a contrary decision as unsatisfactory. While showing, however, the principle upon which this branch of the law rests, this case is also useful in illustrating the difficulty, and perhaps the uncertainty, of its application.

### CHAPTER III.

#### *Dangerous things and premises—Inviting on to premises.*

WHERE something is dangerous to others, or is capable of becoming so if not properly attended to, it is the duty of the person in possession to take reasonable precautions to prevent any injury arising from it; as we have already seen in the cases of *Lynch v. Nurdin*, 1 Q.B. 36, and *Illidge v. Goodwin*, 5 C. & P. 192. There is a special doctrine of law, of which *Fletcher v. Rylands*, L.R. 3 H.L. 330, is the enunciation, by which a man is *prima facie* liable for injury, without any act of negligence on his part, where he brings upon his own land for his own purposes, and collects and keeps there, anything likely to do mischief if it escapes, as water or cattle, and the injury is the natural or probable consequence of the escape; the essence of the action being, not the negligent keeping, but the ~~keeping with the knowledge of the mischievous propensity.~~ <sup>*Fletcher v. Rylands* and its exceptions.</sup> Where the maxim "Sic utere tuo ut alienum non lædas" applies, the element of negligence is not a necessary ingredient of the cause of action. The doctrine in *Fletcher v. Rylands* is qualified as follows: where a person is using his land in the ordinary way, and damage occurs to the adjoining property, without any default or negligence on his part, he is not liable. (See *per* Wright, J., *Blake v. Woolf* (1898), 2 Q.B. 426-428.) In that case water was brought on the premises by the defendant in the ordinary course, and collected in a cistern for the purpose of supplying water to the tenants of the house, and the water

escaped without any negligent act or default of the defendant. He was held not to be liable for the damage thereby occasioned. As the general rule in *Fletcher v. Rylands* depends upon the fact that the dangerous thing is brought on the premises by the defendant for his own purposes, it has no application where the thing is brought on to the premises, not merely for the defendant's own purposes, but for the convenience and with the consent of others. So where the plaintiff, in *Blake v. Wolf* (*supra*), assented to the water being kept on the premises by the defendant; the defendant, in the absence of any negligence on his part, was not liable for damage occasioned to the plaintiff by the water escaping. (See also *Ross v. Fedden*, L.R. 7 Q.B. 661; *Carstairs v. Taylor*, L.R. 6 Ex. 217; *Ander-son v. Oppenheimer*, 5 Q.B.D. 602; and *Humphries v. Cousins*, 2 C.P.D. 239, where the liability of the defendant was established.)

**Dangerous premises.**

Where persons are invited to come upon premises, or to make use of a chattel, it is the duty of the person in possession or control of the premises or chattel—not necessarily the owner—to take care that they are not in a dangerous condition, so as to form, as it were, a trap for persons to fall into. This is so whether the relationship of master and servant exists between them or not; and this duty is based, not on ownership, but on possession or control of the chattel or premises.

***Indermaur v. Dames* : inviting on to the premises.**

In *Indermaur v. Dames*, L.R. 1 C.P. 274; 2 C.P. 311, a gas-fitter contracted to fix certain gas apparatus to the defendant's premises, and sent his servant, the plaintiff, by appointment with the defendant, to see if the work had been properly done. When on the premises, the plaintiff fell through an unfenced shaft in the floor, and was injured. The plaintiff was held entitled to recover damages from the defendant. The premises were those of a sugar-refiner, and such a shaft was necessary for the carrying on of the business; and as the existence of the shaft was well known

to those who were habitually employed there, it was in this case assumed that it was not necessary to give these workpeople any warning of the shaft's existence. There would, therefore, be no breach of duty on the employer's part, no want of due care towards his permanent workmen, and therefore no negligence on his part in not giving them this warning. But towards strangers, lawfully coming upon the premises in the course of their business, such a duty did arise. In the same way, a customer going into a shop is entitled to the exercise of reasonable care by the occupier to prevent damage by unusual danger, of which the occupier knew or ought to have known.<sup>1</sup> The customer goes into the shop "in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much entitled to protection during his accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit. And if, instead of going himself, the customer were to send a servant, the servant would be entitled to the same consideration as the master." (S.C., *per* Willes, J., p. 287.) Again, where the defendant's barge, being unlawfully navigated on the river, the plaintiff, a waterman, complained to the man in charge, who referred him to the defendant's foreman; and the plaintiff went to the defendant's wharf to speak to the foreman, and whilst there a bale of goods, by the negligence of the defendant's servants, fell upon him and injured him, no warning being given to the plaintiff that the bale might fall; the plaintiff was held entitled to maintain an action against the defendant: *White v. France*, 2 C.P.D. 308. The plaintiff was on the premises on lawful business, and by the defendant's invitation. (See also *Corby v. Hill*,

Customer  
going into  
a shop.

<sup>1</sup> *Lancaster Canal Co. v. Parnaby*, 11 Ad. & E. 223; *Chapman v. Rothwell*, 27 L.J. (Q.B.) 315.

*Wilkinson v. Fairrie.*

27 L.J. (C.P.) 318; *Holmes v. N.E. Ry.*, L.R. 4 Ex. 254; L.R. 6 Ex. 123; *Wright v. L. & N.W. Ry.*, L.R. 10 Q.B. 298; 1 Q.B.D. 252; *Scott v. London & St. Katherine's Docks Co.*, 34 L.J. (Ex.) 220.) The case of *Wilkinson v. Fairrie*, 32 L.J. (Ex.) 73, was somewhat different as to the facts. The plaintiff was a carman, sent by his employer to the defendant's for some goods. He went there late in the evening, and after waiting some time, went to inquire for the warehouseman. The porter told him the warehouseman was upstairs, and gave him some direction as to where he might meet with him. He then got into a very dark passage, and seeing nothing, he turned to the left, and fell down a staircase. The plaintiff was non-suited, and the non-suit was affirmed on the ground that, if it was so dark that he could not see, he ought not to have gone on without a light; and if it was sufficiently light to see, he might very well have avoided the staircase, which was a different thing from a hole or trap-door. It was not the duty of the defendant to have the passage lighted; and it was the plaintiff's duty to take care of his own safety by not proceeding along a dark and unknown passage. This case seems just on the line; but there was no satisfactory evidence that the plaintiff had really been directed to go along the passage; and there was certainly no direction given to him to continue on his way if it was too dark to see what he was doing.

*Marney v. Scott.*

*Marney v. Scott* (1899), 1 Q.B. 986, was a case similar in principle to *Indermaur v. Dames* (*supra*), which showed that a person who goes upon premises on business which concerns the occupier, and upon his express or implied invitation, is entitled to expect the occupier to use reasonable care to prevent damage from unusual danger, the existence of which is known, or ought to be known, to the occupier. The defendant chartered, for a single voyage, a vessel which was at the time at sea and in ballast. The charterparty declared that she was in every way fit for

service, and provided that the owners should so maintain her. When the vessel arrived, she was put at the defendant's disposal in dock, and the loading began two hours later, the defendant having contracted with a stevedore to load her. The stevedore had for that purpose engaged the plaintiff amongst others. Fifteen minutes after the work began the plaintiff, in the course of his work, descended a ladder leading into the hold. The ladder came adrift, and the plaintiff fell, and was injured. It was held by Bigham, J., that as the vessel had only for a couple of hours previously come into the defendant's possession, it would be impossible to fix the defendant with the duty of having the vessel surveyed throughout in order to see that every appliance was perfect before he allowed her to be loaded; yet when a vessel comes into port after a voyage, though only a coasting voyage, some attention ought to be devoted to the condition of the tackle and appliances which the stevedore's labourers have to use in their work of loading. What amount of attention ought to be given must depend on the facts in each particular case; but the learned judge thought that the defendant ought in this case to have made at least some examination of the ladders into the hold, and the slightest examination would have shown the defect. The ladder, therefore, in its defective condition formed a trap; the plaintiff had come upon it at the invitation of the defendant, who was then in possession and occupation of the vessel; and the defendant was therefore liable.

There is a case which stands by itself, and has been subsequently doubted, the case of *Collis v. Selden*, L.R. 3 C.P. 495. This case was decided on demurrer, an unsatisfactory way of dealing with a question of principle, attention being directed rather to the form of words used in the pleading, than to the real point to be decided. The facts were (as alleged) that the plaintiff went lawfully into the defendant's public-house, where a chandelier alleged to be

*Collis v. Selden* is an isolated case, and is of doubtful authority.

improperly hung by the defendant, was hanging. It fell on the plaintiff and injured him. It was held that the declaration disclosed no duty by the defendant towards the plaintiff, for the breach of which an action could be maintained.

Willes, J., in his judgment, said: "The declaration is not founded upon any duty of the occupier to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known, but is founded on alleged carelessness in doing an act, viz. hanging a chandelier. The chandelier is to be regarded as movable property, and the declaration should have shown either that it was a thing dangerous in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house." *Collis v. Selden* seems chiefly to have proceeded upon the ground that the declaration did not show who the plaintiff was, how he came to be on the premises, and in what capacity. Byles, J., said: "It does not appear here what capacity the defendant fills. He may be a servant or a master workman. He may be lessor of the premises, or lessee, or sub-tenant. All is left in doubt. Who and what is the plaintiff? All we know of him is that he is not a trespasser. He may have been a guest. That alone would not give him a cause of action. He may have gone into the house to get change for half-a-crown, or to make some inquiry. I cannot see any relation which he bears to the defendant whence a duty would result which has been infringed." But this uncertainty as to the position held by the plaintiff, would also have admitted the possibility that he was a licensee on the premises, who was entitled to be protected against the hidden danger that an improperly hung chandelier might create; and Grove, J., in *Elliott v. Hall*, 15 Q.B.D. 315, declared that he himself would have felt difficulty in coming to the conclusion adopted by the judges in *Collis v. Selden*; and probably the decision ought properly to be

regarded only as a point of pleading dealing with the uncertainty of the declaration.

There are many other illustrations to be found in the books of liability in respect of dangerous premises; and where a person invites others to come upon his premises for a specific purpose, and exacts payment for its use, a special duty arises to have the premises in a fit condition to serve the particular purpose.

The defendants in one case<sup>1</sup> were the owners of a cattle-market, and the plaintiff paid them a toll for a particular site which he occupied by his cattle. A railing just by the site was found by the jury to be dangerous to cattle. A cow of the plaintiff's had injured herself in attempting to jump this railing, and it was held that the plaintiff having been invited to come upon the market for the display of his cattle for sale, a duty was imposed upon the defendants to keep the market in a condition which was a safe one for that purpose. As they had not performed that duty, they were liable for the loss the plaintiff had sustained.

*The Cattle-market case: Lax v. Darlington.*

This case presented some interesting features; and, it will be observed, was one in which the plaintiff had been invited to use the market for a particular purpose upon payment of the toll demanded. It was said that such danger as existed was an open one, and perfectly obvious to the plaintiff. He had often used the market before this accident happened, and therefore knew its character. It was even said that one of his cows had met with a similar accident on a previous occasion. The only question, however, left to the jury was, whether the market (for which the defendants received toll) was or was not dangerous for the purpose for which the payment was made, *i.e.* the reception of cattle. The jury found that the defendants had not afforded a reasonably safe place for the standing of cattle. The Court held that it was their duty to have

<sup>1</sup> *Lax v. Darlington Corporation*, 5 Ex. D. 28.



provided a place which was not dangerous for the purpose; and this duty was upon them, whether as owners of the market, or as owners of the land receiving the cattle on their land for payment. The defendants were, therefore, held liable. But the judges who decided the case, and the C.A., agreed that the defendants' primary liability would have been displaced, if it had been shown that the plaintiff had deliberately undertaken a risk which was well known to him. But the defendants did not discharge their legal duty, observed Bowen, L.J., in commenting on this case in *Thomas v. Quartermaine*, 18 Q.B.D. at p. 697 (and see Chap. xvi.), "by merely affecting the plaintiff with knowledge of a danger which the defendants' breach of duty alone produced."<sup>1</sup>

Defective  
stand.

Where a defendant admitted persons, upon payment, to a stand, which was found not to be reasonably fit for the purpose for which it was let, the defendant, on the same principle, was held liable to those who had suffered damage caused by this defect.<sup>2</sup>

<sup>1</sup> See also *Winch v. Conservators of the Thames*, L.R. 9 C.P. 378.

<sup>2</sup> *Francis v. Cockerell*, L.R. 5 Q.B. 501.

## CHAPTER IV.

### *Licenses and invited persons—Sale of dangerous things— Railway companies and personal luggage.*

A DISTINCTION is drawn between a person who is invited to come upon premises, or is there in the course of business; and one who is a bare licensee.

When a man is a bare licensee, the owner or occupier of the premises has no duty towards him to keep the premises in repair. His only duty towards him is not to lead him into a "trap." He need not guard him against dangers which are open and visible. The two cases illustrating this proposition are *Bolch v. Smith*, 31 L.J. (Ex.) 201, and *Corby v. Hill*, 27 L.J. (C.P.) 318. In *Bolch v. Smith* the plaintiff, who was a mere licensee, was walking along a yard which was obstructed by machinery not sufficiently fenced, and injured himself upon it. It was held that as he had only a license to use the yard, his only right was not to be treated as a trespasser, and that the defendant was under no obligation, as towards him, to fence the machinery at all; and therefore was not liable for insufficiently fencing it. But it was intimated that if the fencing had been apparently sufficient, but not really so, or if the machinery had been concealed, or if there had been anything in the nature of a "trap," as explained in *Corby v. Hill*, the defendant would have been liable.

In *Corby v. Hill* the owners of a private road, along which persons were permitted to pass by the owners' leave, had given permission to the defendant to place building materials on it. He placed these things in such a way

Distinction between a "bare licensee" and an "invited person."

Injury caused to person lawfully on a private road

by an ob-  
struction  
negli-  
gently  
placed  
there by  
the defen-  
dant.

as to be dangerous to persons using the road, and gave no warning that it was in this dangerous condition. An injury was caused to the plaintiff's horse while he was lawfully using the road. The defendant was held liable to recoup him the damage sustained. "I should have thought that a statement of the facts was sufficient to show that the plaintiff had a remedy, because the defendant had no right to set a trap for the plaintiff. A person coming on lands by license has a right to suppose that the person who gives the license, and much more a person who is a wrong-doer, will not do anything which will cause him injury." So said Willes, J.

But a mere  
licensee  
cannot  
maintain  
an action  
against  
the  
licensor  
because  
his pre-  
mises are  
not in  
repair, un-  
less in  
case of a  
"trap."

*Gautret v. Egerton*, L.R. 2 C.P. 371, and *Ivay v. Hedges*, 9 Q.B.D. 80, are similar cases showing that a bare licensee has no remedy against the person giving a license to use a way for not keeping it in repair. But in neither of those cases was it established that anything in the nature of a "trap" had been prepared. In *White v. France* (*ante*, p. 49), Denman, J., said: "The bale which caused the injury was placed in such a position as to be dangerous, and yet to give no warning of danger to any one passing by the spot where it fell, so that it was in the nature of a 'trap'; so that whether the plaintiff could be properly described as a bare licensee or not, the defendant would be liable."

In *Batchelor v. Fortescue*, 11 Q.B.D. 474, the plaintiff, a workman employed by a builder to watch and protect some unfinished buildings, went on to land near where the defendant, a contractor, was carrying on excavations for the foundations of other buildings. He had nothing to do with the excavations, but was standing where he need not have been, watching the men at their work, just underneath a bucket, worked by a steam-crane and winch, by which the earth was raised and conveyed to carts; the bucket passing about three feet above his head. It fell upon and injured him. There, the plaintiff was at most a

bare licensee, and he stood where he did subject to all risks attaching to the position in which he had chosen to place himself. A verdict for the defendant was upheld by the Court of Appeal.<sup>1</sup>

As to what forms a "trap" on lands over which persons have permission to go; the existence of a hole some distance from the path along which a person is permitted to go may not be sufficient to constitute a "trap." *Hounsell v. Smyth*, 29 L.J.C.P. 203, was a case where the plaintiff walking one night over some waste lands, open by the defendants' permission to the public, strayed from his path, and fell into a quarry worked by the defendants' leave, and was injured. The quarry was alleged to be situated between two public roads leading over the waste; and it was claimed on the plaintiff's behalf, that there was a duty on the defendants to fence the quarry, and as they had not done so, that they were liable to him. It was held, in accordance with long-established decisions, that the plaintiff had no right of action. If he makes use of the permission given him to walk across the waste, he accepts the position with its perils; subject only to this, that if a hole has been made in the road, or so near to it as to make its use dangerous, and permission is given to go across the road without any protection against, or warning of, the existence of the hole, the owner giving this permission is liable to any one who sustains injuries by falling into the hole. Such conduct on the owner's part would constitute a public nuisance; and if a private injury result from a public nuisance, an action for damages is sustainable. In *Barnes v. Ward*, 19 L.J.C.P. 195, on the other hand, the defendant was held liable, because he had made a hole in a place abutting on a footway along which the plaintiff had a right to go, and the plaintiff was injured in consequence; and in a similar way in *Corby v. Hill* (*ante*, p. 55) the defendant was liable, because he had

<sup>1</sup> And see *Tolhausen v. Davies*, 57 L.J.Q.B. 392; 58 L.J.Q.B. 98.

held out an inducement to persons to come upon the road, by allowing it to be used as an access to his house, and he had given no warning that a dangerous obstruction had been placed in the road. But subject to this, the law imposes no duty upon an owner of land to fence excavations he may have made in it, so as to protect anybody who may go upon his land.

The use of  
dangerous  
articles.

The same principle applies in respect of articles which are dangerously defective, or which are in themselves dangerous. It is a breach of duty to use or deal with a thing in its nature dangerous and likely to cause injury, without exercising great care. The thread of common and necessary prudence is plainly to be perceived running through the duties defined by the law, the neglect of which goes to constitute negligence.

The defendant, a colliery owner, consigned coals to the buyers by rail in a truck rented by him from a waggon company. Through the negligence of the defendant's servants, the truck was allowed to leave the colliery in a defective state. In consequence of this defect, the plaintiff, one of the consignee's servants, who was employed in unloading the coals from the truck, and who got into it in order to do so, was injured. There was, of course, no contractual relation here between the defendant and the plaintiff; but the defendant was held liable, because there was a duty on him towards the plaintiff to exercise reasonable care in regard to the truck, which he knew must be made use of by the consignee or his servants in unloading the coal: *Elliott v. Hall*, 15 Q.B.D. 315. Although it was in this case conceded by the defendant that the doctrine of "invitation," by which a man is liable to any one whom he invites on his premises where there is a concealed danger or "trap," is equally applicable where a person is invited to enter a chattel, such, for instance, as a cart;<sup>1</sup> yet it was urged that it was not applicable to chattels

<sup>1</sup> *Smith v. Steele*, L.R. 10 Q.B. 125.

which were no longer in the occupation, or in charge of the person giving the invitation. That argument did not succeed. Not only was the defendant the person who had the entire dominion over the truck, but it was also part of the contract for the sale of the coals to the plaintiff's employers, that they should be conveyed in a truck; and it was necessarily contemplated that the truck should, upon arrival, be unloaded by the buyers' servants. Under these circumstances a duty, independently of the contract, arose on the defendant's part towards the plaintiff to see that the truck was not in a dangerous condition. The defendant would not have been liable in respect of injury arising out of a hidden or latent defect which could not reasonably be foreseen; but he was bound to see that the truck was apparently in good condition when it left his colliery; and this duty he had neglected to perform. (See also *Heaven v. Pender*, 9 Q.B.D. 302; 11 Q.B.D. 503 (*post*, p. 71).) The defendant's duty, however, is limited to guarding only against such accidents as may reasonably be foreseen: *Pearson v. Cox*, 2 C.P.D. 369.

But in truth these cases of injury arising from the negligent user of things dangerous, or likely to be so, do not depend upon any privity of contract, or fraud, or concealment, or upon a public nuisance having been created. It is a misfeasance independent of contract; and upon this ground the plaintiff was held entitled to recover in the case of *Parry v. Smith*, 4 C.P.D. 325. The defendant in that case was a gas-fitter, employed by the plaintiff's master to repair a gas-meter on his premises. The gas-meter had been taken away, and a temporary connexion by means of a flexible tube had been made between the service-pipe and the inlet-pipe. The plaintiff having gone, in the course of his duties, with a light into the cellar where the meter had been, gas, escaping by reason of the negligent manner in which the connecting-tube had been fixed, exploded, and injured him.

*Parry v.  
Smith.*

The duty towards a purchaser of the seller of dangerous articles.

Apart from warranty, or from any liability arising out of the contract, a duty to the purchaser of goods may be imposed upon the seller. Where a man sells goods, which he knows to be dangerous, to any one who is unaware of their dangerous character, this position creates a relationship between the parties out of which the duty arises to warn the purchaser that the goods are dangerous; and this duty is apart altogether from the contract of sale.<sup>1</sup> It falls both within the M.R.'s definition in *Heaven v. Pender* (*post*, p. 72), and within the principle enunciated by Cotton, L.J., in the same case, when expressing disagreement with the M.R.'s definition.

*Ward v. Hobbs* forms no exception to the rule.

*Ward v. Hobbs*, 4 App. Cas. 13, does not conflict with the statement that a duty, independently of the contract of sale, to give warning of their danger is cast upon the vendor who sells articles which he knows, or ought to know, are dangerous, to a purchaser who is ignorant of that circumstance. For there the pigs, which the vendor knew to be suffering from a contagious disease, and nothing being done by him to conceal this, were sold on the condition that they were to be purchased with all faults without any compensation. But if the vendor had added to this express statement that he would give no warranty and that the cattle must be taken with all faults, an untrue statement that he believed, as far as he knew, the cattle were free from defects, he would have been liable on an action of deceit for the false representation. This case, then, where the plaintiff could not recover for injuries he had sustained through the cattle he bought affecting other cattle, forms no exception to the proposition laid down in the cases already cited; because the article was sold, as Lord Cairns said, "with a statement, not merely that the vendor does not warrant it, but that the purchaser must

<sup>1</sup> *Clarke v. Army and Navy Stores* (1903), 1 K.B. 155; *George v. Skivington*, L.R. 5 Ex. 1; *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337.

take it with all its faults . . . ; and you cannot therefore contend that the purchaser is afterwards at liberty to turn round and say, 'There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of.' "

There are other circumstances also where duties arise apart from any contractual obligation. In *Austin v. G.W. Ry.*, L.R. 2 Q.B. 442, Blackburn, J., held that when a railway company receive some one as a passenger (without any fraudulent representation inducing the company to do so), a duty arises out of that circumstance towards the passenger to carry him safely, apart from any contract made, and therefore irrespective of whether any contract to carry had or had not been entered into. In *Austin's case*, a child a month or two over three years of age travelled with his mother. She took a ticket for herself, but not for the child; but there was no intention to defraud the company. The child was injured, in the course of the journey, through the negligence of the defendants, and was held entitled to maintain an action against the defendants. In the course of his judgment, Blackburn, J., approved of the case of *Marshall v. York, Newcastle, etc., Ry.*, 11 C.B. 655, which was a decision to the same effect. And this duty extends, beyond the actual conveyance of the passenger, to making proper provision for his safety in alighting from the carriage, and in quitting the defendants' premises at the conclusion of the journey.<sup>1</sup>

In *Austin's case* the injured child was merely a licensee; but the defendants, in allowing him to travel in their train, had imposed upon themselves the duty of exercising reasonable care in and about his conveyance. "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care:" *per* Parke, B., *Lygo v. Neubold*, 9 Ex. at p. 305. There is, therefore, a different and a more

Railway companies' duty to passenger to carry him safely, apart from contractual obligations.

A licensor, who gratuitously undertakes to carry a licensee, or his property, must do so with reasonable care.

<sup>1</sup> *Foulkes v. Met. Dist. Ry.*, 5 C.P.D. 157.



extensive liability attaching to one who gratuitously undertakes to carry a mere licensee, from that which a licensor incurs who permits a licensee to come upon his premises.

In *Moffatt v. Bateman*, a case decided in the Privy Council in 1869 (L.R. 3 P.C. 115), a master had allowed his gardener to drive with him in his carriage, and an accident happened to the vehicle during the drive, by which the gardener was injured. An action by him against his master failed, because, as it was declared in the judgment delivered, "there really is no evidence whatever of negligence of any description on the part of" the defendant. It was also laid down that if a person offer another a seat in a carriage which he is driving, he would be liable for "negligence of a gross description." This description of negligence was, however, not defined further, than that it was said to be "the degree of negligence which renders a person performing a gratuitous service for another responsible." It seems superfluous to inquire what may have been meant by "negligence of a gross description" in a case where there was no negligence at all; and *Lygo v. Newbold* and other cases show, that the duty is to exercise due and reasonable care in carrying the licensee. In the absence of such care, in consequence of which the person carried is injured, an action of negligence will lie against the person who undertook to carry.

*Harris v. Perry.*

*Harris v. Perry* (1903), 2 K.B. 219, is the most recent exposition of this principle, which was enunciated in *Lygo v. Newbold*; *Marshall v. York, Newcastle, etc., Ry.* (*supra*), and *Austin's case* (*supra*). The defendant in *Harris's case* was the contractor for making a tunnel for a tube railway. He had constructed a temporary line, on which an electric engine ran, which drew trucks containing the excavated material. The defendant had directed that no one should ride upon it but the driver and a guard. As a fact, however, it was used for the conveyance of officials,

both in the employment of the defendant and of the railway company, with the knowledge and assent of Rowell, the defendant's representative. The plaintiff was an inspector employed by the railway company, and as he was walking along a planked platform provided for the use of the officials, he was overtaken by the electric engine. One of the officials in the defendant's service was riding upon the engine, and he invited the plaintiff to join him. The plaintiff did so, and had not proceeded far, when the engine ran into a truck, and he was injured. The jury found that the plaintiff was on the engine with Rowell's permission, and was on it for his own convenience; and that the accident was due to the negligence of the defendant's servants. The action was tried before Wills, J., who entered judgment for the plaintiff; and on an application by the defendant to the Court of Appeal for a new trial or that judgment should be entered for him, the judgment below was affirmed. Collins, M.R., in dealing with the summing-up of Wills, J., said: "He suggested that the measure of duty towards a bare licensee is different, where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises; and I think the cases support this view." Whilst the M.R. thought from the evidence that the jury might have found that "a trap" had been laid for the plaintiff, he added: "At all events, I think it was competent for the jury to find a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust imposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of

another, and in the case where a person or his property is received into the custody of another for transportation."

A master, unless he is himself a party to the contract, cannot maintain an action for loss of the services of his servant injured while a passenger on a railway. It is obvious that he cannot do so on the ground of contract, for the contract was not made with him; and apart from the contract, the duty incurred by the company is towards their passenger only. But the master can maintain such an action against another railway company by whose negligence the loss and injury has been caused, just as he might have an action in respect of damage to his property which had been damaged by the negligent act of a stranger.<sup>1</sup>

*Taylor v. M.S.L. Ry.* (1895), 1 Q.B. 134, was an action by a passenger against a railway company for injuries sustained by him through the negligence or misfeasance of a porter, who crushed the plaintiff's thumb in closing the door of the carriage as the plaintiff was entering it. The plaintiff succeeded; and it was held that the action was founded on tort, and not on contract.<sup>2</sup> It was so held, also, in *Kelly v. Met. Dist. Ry.* (1895), 1 Q.B. 944, where *Taylor's case* was explained, by pointing out that whether the negligence was an act of omission or of commission made no difference in this kind of case.

Personal luggage carried by railway company: *Meux's case* and *Becher's case* considered.

The same principle laid down in *Foulkes' case (supra)* is applicable to the case of personal luggage delivered to a railway company's porter, where the porter negligently damages the portmanteau and its contents, which belongs, not to the servant who had taken the ticket and delivered the portmanteau, but to his master. A master, who was the plaintiff, succeeded in establishing the liability of the

<sup>1</sup> *Berringer v. G.E. Ry.*, 4 C.P.D. 163.

<sup>2</sup> And see also, as regards an action founded on the common-law liability of a bailee, *Turner v. Stallibrass*, (1898), 1 Q.B. 56; see also *Sachs v. Henderson* (1902), 1 K.B. 612.

company to him in such a case for the tortious act of their servant.<sup>1</sup> In this case, however, the article in the portmanteau, for the destruction of which the plaintiff sued and recovered, was a suit of livery which, while it belonged to the master, the servant was in the habit of wearing. It is necessary to point to that fact, because a distinction was founded upon it in reference to a previous case,<sup>2</sup> where a plaintiff having given his portmanteau to his servant to travel on the defendants' railway in advance of him, was held not entitled to maintain an action against the defendants, when the portmanteau was lost during the servant's journey by the defendants' default. This decision appears to be inconsistent with the decision in *Meux's case*. The first thing to notice about *Becher's case* is, that it appears from the argument and the judgments that the decision was based entirely on contract. The defendants had contracted with the servant, and not with the plaintiff, and if there were no further liability on the defendants than that arising out of the contract, it is obvious that the servant, who made the contract with the defendants, could alone sue in respect of any breach of it. The duty on the part of the defendants, having accepted the portmanteau as the servant's luggage, to carry it with reasonable care, apart altogether from their liability under the contract, was not in *Becher's case* admitted, or much considered. In *Austin's case* (*supra*) the existence of this duty had been definitely recognized by Blackburn, J., though only tentatively accepted by the other judges who were parties to that decision. In *Foulkes' case* (*ante*, p. 61) all the judges agreed that, apart from any question of contract, the plaintiff having been accepted by the defendants as a passenger, a duty is cast upon them to carry him without injuring him by

<sup>1</sup> *Meux v. G.E. Ry.* (1895), 2 Q.B. 387; and see *Hayn v. Culliford* 4 C.P.D. 182.

<sup>2</sup> *Becher v. G.E. Ry.*, L.R. 5 Q.B. 241.

their negligence. In *Meux's case*, although the plaintiff had no rights under the contract, because it was not made with her, all the judges were of opinion that, apart from the liabilities under the contract, there was a duty on the defendants to carry the portmanteau without negligence, a duty owed to its owner. The box was there with the defendants' knowledge and authority to be carried by them; and if they commit a wrongful act in respect of it, the injured person has a right of action against them for their tort. All the decisions, it was said, were binding as to that. *Becher's case* was cited in the argument, and though not specifically mentioned in the judgments, it is clear that Kay, L.J., in the course of his judgment endeavoured to distinguish it, as though the basis of the decision had not been that the action was founded on contract. It is to be remembered that the judges agreeing with the decisions that when a passenger is accepted by a railway company they are bound, whether there is a contract or not, to carry him without negligence, extended this principle to the case of goods accepted by a railway company to be conveyed by them. The portmanteau was lawfully on the defendants' premises for the purpose of being carried; and being taken up by one of their servants in order to carry out that purpose, it was negligently dropt by him on to the line and damaged. So far this seems exactly on all fours with the condition of things in *Becher's case*. This is how Kay, L.J., endeavoured to distinguish that case: "Supposing the company had known that the portmanteau had contained the servant's livery," he asked, "could they have said they would not carry it as personal luggage? It seems to me quite plain that they could not have said anything of the kind, and in that respect the case differs from that of luggage containing goods belonging to other people in which the person who is carrying them as his personal luggage has no kind of interest." The learned Lord Justice made this remark on the question whether the portmanteau was lawfully on the

defendants' premises, and came to the conclusion that it was, on the ground, it would seem, that the servant had the right to wear a suit contained in it, and in *Becher's case* this was not so. But he continues: "I am not going to give an opinion upon the question whether, if the goods had not belonged to the servant at all, but to some one else, and were in his portmanteau, they would have been lawfully upon the premises of the company. It seems to me, I must confess, a strong proposition to say that, where the company make no inquiry as to what is in the portmanteau, but accept it as personal luggage, they should be able to turn round and say: 'The goods were not yours.' However, on that point I give no opinion at the present time, because there seems to be some authority in a sense opposite to the view which I have indicated." The distinction which the learned Lord Justice draws, viz. that here the servant had some kind of interest in the goods, while in *Becher's case* he had none, seems therefore to have been in a measure disposed of by the learned judge himself. In *Becher's case* the goods were in the defendants' custody, and had been accepted by them as the personal luggage of the servant, who was sent on in advance with the luggage by his master (the plaintiff), who himself followed without luggage by a later train. If the servant had brought the action, the question whether he could recover damages for injury to goods which were not his, has now been cleared up by the overruling by the C.A. of the case of *Claridge v. S. Staffordshire Tram Co.* (1892), 1 Q.B. 422, in *The Winkfield* (1902), P. 42. It was decided in the latter case, after a careful and elaborate consideration of the cases, that a bailee in possession can recover the value of the goods from any one who has lost them by his negligence; although the bailee would have had a good answer to an action by his bailor for damages for the loss of the thing bailed. "The root principle is," said Collins, M.R., "that, as against a wrong-doer, possession is title. The chattel

that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. . . . There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger, possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee, the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of the bailor. The wrong-doer, having once paid full damages to the bailee, has an answer to any action by the bailor.” (*The Winkworth* (*supra*), at p. 60.)

As *The Winkworth* (*supra*) has now put an end to all doubt that the servant, in his character of bailee, may recover the whole loss in cases such as *Becher's case* and *Meux's case*, it becomes of less practical importance to inquire whether the master could also sue. But *Meux's case* goes some way to weaken the authority of *Becher's case*. The only distinction suggested between these two cases is, that as the servant's livery in the former case was worn by the servant, he had some sort of interest in it which would make it his “personal luggage,” and that therefore the goods were “lawfully” on the defendants' premises. It would seem difficult to say that where a servant is taking charge of his master's portmanteau by his master's direction to convey it from one place to another by the railway, he has not “some kind of interest in it” sufficient to make the portmanteau “lawfully” on the company's premises for that purpose.

The term “personal or ordinary” luggage has been

much discussed, but for the most part in view of the character of the goods, so as to distinguish that kind of luggage from merchandise, which the traveller would not be entitled to take with him free of charge. It was held many years ago, that if a company chooses to take as "personal" luggage that which they know not to be personal luggage, but to be merchandise, they cannot escape liability by saying that it was not, in fact, "personal" luggage.<sup>1</sup> But where no question of merchandise being packed with or as personal luggage arises, then if the test is, as Kay, L.J., said it is (and as Parke, B., in his judgment in *Shepherd's case* also seemed to think), supposing the company had known that the portmanteau contained the servant's livery, could they have declined to carry it?—a question which he answers decidedly in the negative—the question in *Becher's case* would be, if they had known that the servant, going on by an earlier train than his master, had his master's goods in his portmanteau, could they have refused to carry it? Could they have insisted that his master, who followed by a later train, must himself take it with him? It seems a strong thing to say that in theory they could, when it is obvious that as a matter of common practice they would not say anything of the kind. The goods in the portmanteau being of a personal character, can it be said that they were not "lawfully" on the defendants' premises or in their custody because, both master and man having taken tickets, the servant is sent on in advance with the luggage? Lord Esher, however, draws no distinction between *Meux's case* and *Becher's case*. He puts the matter on another ground. "If they [goods] are put openly on the platform to be carried by the company, they know that the goods are there; they allow them to be there; and it must be a wrongful act for them to deal negligently with them." "For such a wrongful act the person

<sup>1</sup> *Cahill v. L. & N.W. Ry.*, 31 L.J.C.P. 271; *G.N. Ry. v. Shepherd* 21 L.J. Ex. 286.



injured has a right of action against them, although as between him and them there was no contract, and although there was a contract between them and some one else with regard to the luggage." He then quoted with approval the opinion of Bramwell, B., in *Hayn v. Culliford*, 4 C.P.D. 182, in which the defendants were held liable: "The goods were lawfully, with the defendants' licence, in their ship, and they tortiously so dealt with them that the goods were injured;" and himself adds: "The proposition would have been equally good if the word 'lawfully' had been omitted." The M.R., therefore, put the case on the basis that the goods having been accepted for carriage by the company, if they are tortiously dealt with by them, the company is liable to the owner, whatever the contract between the company and some one else as to those goods may have been. It may very well be, since the decision in *Meux's case*, that if facts arise which make it necessary to review *Becher's case*, that decision will not be upheld.

In the case, then, both of passengers and of goods, there is a duty to carry with reasonable regard to safety, independently of the contract or the person with whom the contract was made. We saw this (as to passengers) in *Austin v. G.W. Ry.* (*ante*, p. 61), and in *Harris v. Perry* (*ante*, p. 62); and as to the case of goods, this is further illustrated by *Martin v. Great Indian Penin. Ry.*, L.R. 3 Ex. 9. There the plaintiff's goods were received for carriage under a contract made with the Indian Government, and, whilst they were being carried, they were destroyed by the defendants' negligence. The plaintiff could not sue the defendants for non-performance of their duty as carriers, for the contract was not made with him. But he was held entitled to sue, as for a tort, for an injury done to his property, while it was in the defendants' custody, through their negligence.

## CHAPTER V.

### *Dangerous articles (continued)—Heaven v. Pender— Implied warranties—Delegated duties.*

WHERE, at the time of the sale, the vendor is informed that the article is for the use of some one other than the purchaser, as in *George v. Skivington*, L.R. 5 Ex. 1, where he was told that the hair-wash purchased was for the use of the purchaser's wife; or where the use of the article by some one other than the purchaser was at the time of sale contemplated by the vendor, as in *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337; the person injured by its use has a good cause of action. But it is necessary to observe that this statement of the law as to the sale of an article only applies to dangerous articles. The proposition of law contained in *Langridge v. Levy* (*supra*), *George v. Skivington* (*supra*), and *Heaven v. Pender* (*infra*), was erroneously applied in *Cann v. Wilson*, 39 Ch. D. 39, where valuers, at the request of the solicitors of an intending mortgagee, prepared a valuation of the property proposed to be mortgaged, and the mortgagee was held to have a good cause of action against the valuers; because (*inter alia*) they were considered to owe a duty (independently of contract) to the plaintiff, to use reasonable care in preparing the valuation, a duty they had not discharged. But this case was overruled in the course of the case of *Le Lievre v. Gould* (1893), 1 Q.B. 491 (*post*, p. 75), where it was pointed out that a written piece of paper was not a "dangerous article" like a gun, or an article which unexpectedly explodes.

In *Heaven v. Pender*, 9 Q.B.D. 302; 11 Q.B.D. 503, the *Heaven v. Pender*.

Dangerous articles : duty towards those for whom the article is purchased.

principle was established that one man may, under certain circumstances, owe a duty to another, although there is no contract between them. The plaintiff there was engaged on work on a vessel, in the performance of which the defendant, as dock-owner, was interested; and it was held that he owed a duty to the plaintiff to take reasonable care that the staging and ropes supplied were fit for use. The defendant had put up the staging outside the ship in his dock, under contract with the shipowner. The plaintiff was a painter employed, not by the defendant, but by a contractor who had contracted with the shipowner to paint the ship. In order to do the painting, the plaintiff went upon and used the staging, when one of the ropes by which it was slung, being unfit for use when it was supplied by the defendant, broke, and the defendant fell into the dock and was injured. The defendant was held liable for this breach of duty. Brett, M.R., in the course of his judgment, laid down the proposition that, whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognize, that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger; and the proposition was further extended by him to the case of goods, etc., being supplied in order to be used by another person. Cotton, L.J. (in whose judgment Bowen, L.J., concurred), declined to agree with the M.R. in laying down the principle enunciated, which seemed to him to be unnecessarily large; and further, one which was not to be found in the decided cases. But in dissenting, he said: "I in no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning, supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in

The rule  
in *Heaven*  
v. *Pender*  
stated by  
M.R.

such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." It is, however, submitted that the principle enunciated by the M.R. is what he claims it to be, "a good, safe, and just rule." The judgment given by Cotton, L.J., would cover such cases as *Langridge v. Levy* (*ante*, p. 71) and *George v. Skivington* (*ante*, p. 71), where articles known by the seller to be dangerously defective, were sold by him for the use of a particular person, other than the purchaser, to whom they caused injury, and an action for damages was held to be sustainable. The decision in the former case was undoubtedly based on what was called "the fraud" of the defendant in representing the article to be safe, when he knew it to be unsafe; and the action was shaped as an action of deceit. But in the latter case the decision was based by the judges on the ground that the defendant owed a duty to the plaintiff, and by the breach of that duty had been guilty of actionable negligence.

All the judges who decided *George v. Skivington* based their judgments on the fact that the allegations raised a duty on the defendant's part towards the plaintiff; and the action would have been supported without proof of fraud. But one of Cotton, L.J.'s, objections to accepting the proposition of the M.R. was, that the principle was impliedly negatived by these cases which were decided on the basis of fraud. It does not seem to follow that, because judges have treated fraud as the ground of decision in those cases, therefore the proposition, that the action might have been supported without proof of actual fraud, is impliedly negatived. On the contrary, the proposition put by Cotton, L.J., disproves any such implied rejection, because it covers those cases, without suggesting fraud as their basis.

Moreover, *Derry v. Peek*, 14 App. Cas. 337, decided that negligent misrepresentation does not amount to fraud so as

*Derry v.  
Peek.*

to sustain an action for deceit. An action of deceit must be based on fraud; and negligence is not of itself fraud; though it may be of such a nature as to make it highly probable that there was fraud. No amount of fraud, therefore, will make that a negligent act which is not in itself negligence; in other words, unless a duty lies upon the defendant to exercise care towards some one, his not doing so, however fraudulent his action may be, does not constitute negligence. So much *Derry v. Peek* decided. Therefore, it is submitted, that because *Langridge v. Levy* was an action of deceit, and the decision was based on fraud, this does not negative the rule of negligence laid down by the M.R.; nor indeed does it touch the question whether an action of negligence might not also lie in circumstances which would support an entirely different ground of action, viz. an action of deceit. Though *Langridge v. Levy* (*ante*, p. 71) was an action for deceit, and was decided on that basis; *George v. Skivington* (*ante*, p. 71) shows, that it could also have been supported as an action of negligence, if the action had been so shaped.

Liability  
for negli-  
gently  
carrying  
out  
statutory  
powers.

*Hurst v. Taylor*, 14 Q.B.D. 918 (*ante*, p. 29), subsequently decided, further illustrates the rule as enunciated by the M.R., in which it was held that a duty is upon those who, exercising statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath, from injury through going astray at the point of divergence. The case was put, not as one of nuisance, but of negligence in the performance of a legal duty; and a non-suit entered by Day, J., was set aside by the Divisional Court. Lopes, J., thought the case raised a novel point, which must be decided upon general principles of law applicable to negligence. "The law," he said, "appears to me to be this: if a reasonably careful man might go astray in the dark at the point of divergence, then a duty is imposed upon those who, under statutory powers, have diverted the path, to use reasonable

means to protect the public." And he thought there were two questions for the jury: (1) was the place one where a reasonably careful man might go astray on a dark night? and (2) did the defendants use reasonable care to protect the public at that point? The rule laid down by the M.R. seems to cover this kind of case, which also appears to lie outside the more restricted view put forward by Cotton, L.J.

The further objection taken by Cotton, L.J., to the rule enunciated by the M.R., *i.e.* that it is not in terms laid down that any such principle exists, cannot be a valid objection to a rule which is intended to be deduced from, and to express the effect of, previous decisions, if in fact, it does so. It is to be noted, that the rule deduced by the M.R. does not apply to the case of a volunteer; while it includes, and does not displace, the rule that where you "invite" a man upon your premises, you must not lay a "trap" for him.

But attempts were made to extend the rule in *Heaven v. Pender* to cases where certificates of work done, having been carelessly given, some person to whom they are shown, is misled and suffers damage. The case of *Lievre v. Gould* (1893), 1 Q.B. 491 (which incidentally overruled *Cann v. Wilson*, 39 Ch. D. 39 (*ante*, p. 71)), shows, with much elaboration, that the rule in *Heaven v. Pender* has no application whatever to such cases. The mortgagees of a builder's interest under a building agreement made advances to him on the faith of certificates given by a surveyor as to the progress of the buildings. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the surveyor's negligence, the certificates contained untrue statements as to the progress of the buildings; but there was no fraud on his part. It was held in this case that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and no action could

be maintained against him by the mortgagees in respect of his negligence. Here the idea of fraud was negatived by the finding of the official referee; but it was urged that the *ratio decidendi* of *Heaven v. Pender* (*ante*, p. 71) applied, so that a man should be held responsible for what he states in a certificate, to anybody to whom he may suppose that the certificate might be shown. "But," said Bowen, L.J., "the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly. (See also *Angus v. Clifford* (1891), 2 Ch. 449.) *Heaven v. Pender* (*ante*, p. 71) showed that, under certain circumstances, a duty may lie on one man towards another, although there are no contractual relations between them. But here there was no duty which the surveyor owed to the mortgagees, who were not his employers. "A man," said Lord Esher, M.R., in the course of his judgment in that case, "is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." There was therefore no duty on the surveyor towards the plaintiff to give certificates without being negligent; and there was no contract between them, and consequently there could be no breach of it. But even if fraud had been proved against the surveyor, that would not have established an action of negligence against him; but would have sustained an action of deceit, which must be based on fraud. While the decision in *Heaven v. Pender* was held not to apply to such a case, it also does not seem to fall within the terms of the M.R.'s rule, which contemplated as its basis the existence of a duty owed by one man to another.

*Lane v.  
Cox.*

A further instance in which the plaintiff was non-suited because no duty arose on the defendant's part towards the plaintiff, occurred in the case of *Lane v. Cox* (1897), 1 Q.B. 415. The landlord of an unfurnished house let the house

to a tenant when it was in a dangerous condition, the staircase being unsafe. There was no contract by the landlord to put or keep the premises in repair. The action was brought against the landlord by a workman employed by the tenant to remove his furniture, for personal injuries he sustained while doing so by reason of the defective state of the staircase. Here there was no duty, even as between the landlord and his tenant, in the absence of any contract, to keep the premises in repair; and there being no duty imposed on the landlord towards his tenant, there could be no duty to a stranger. "The case differs entirely," said Lopes, L.J., "from those in which an injury happens to one of the public on a highway, or to the occupier of an adjoining house."<sup>1</sup>

But though a landlord of an unfurnished house, in the absence of a contract to repair, is not liable to his tenant or to any one using the premises, for personal injuries happening within it during the term, due to the defective state of the house, yet where a building is let in flats, and the staircase giving access to the different flats is in the possession and control of the landlord; it has been held that there is, by necessary implication, an agreement by the landlord with the tenants to keep the staircase in repair; and as it must necessarily have been in the contemplation of the landlord that persons having business with the tenants would use the staircase, there was a duty cast upon him towards those persons, to keep it in a reasonably safe condition. An injury sustained by a person visiting a tenant of a flat by reason of the defective state of the

Liability  
of landlord  
of flats for  
defective  
state of the  
common  
staircase.

<sup>1</sup> But it had previously been held that a landlord, in the absence of a contract to repair, who lets an unfurnished house in a ruinous condition, is none the less guilty of a misfeasance which would make him liable to a stranger who thereby suffered injury (see *Nelson v. Liverpool Brewery*, 2 C.P.D. 311); but not otherwise, unless there was a contract by the landlord to do repairs. And see *Sandford v. Clarke*, 21 Q.B.D. 398, the case of a defective coal-plate belonging to premises let on a weekly tenancy renewed from week to week.



common staircase gives rise, therefore, to a good cause of action.<sup>1</sup>

Difference  
where  
mere  
license  
granted by  
landlord.

But the case is different where a mere license is granted by the landlord of a house let to several tenants in apartments, to use a portion of the premises which does not form any necessary way or access to the several apartments. In such case the tenant is a mere licensee, to whom the landlord owes no duty to fence such portion of the premises, or to keep it in repair. Thus, where a landlord gave permission to his lodgers to use the roof of the premises as a drying-ground, he was not held liable when a tenant, availing himself of this license, met with an injury because a rail round the edge of the roof was out of repair.<sup>2</sup>

The Caledonian  
Railway  
case.

In the *Caledonian Ry. v. Mulholland* (1898), A.C. 216, an attempt was again made to misapply *Heaven v. Pender* (*ante*, p. 71). Waggon's belonging to the Caledonian Railway were filled with coals from pits on that railway's system, and delivered to the Glasgow Railway Company at their Dumfries station. As soon as the waggons arrived at Dumfries station, every obligation undertaken by the Caledonian Railway was at an end. It was the place of delivery, and delivery might, as of right, have been there taken. But the Glasgow Company, for their own purposes, made an arrangement with the Gas Commissioners by which they were to haul the coals from the station, which was the place fixed under the contract with the Caledonian Railway as the place of delivery, to the Gas Commissioners' premises about a quarter of a mile distant. On the journey from the station to the gas-works one of the trucks, by reason of an imperfection in the brakes, was not checked quickly enough to prevent it running into another truck, and the plaintiff's husband, a servant of the Glasgow Company, was crushed between the two and killed. The plaintiff brought an action against both the Glasgow

<sup>1</sup> *Miller v. Hancock* (1893), 2 Q.B. 177.

<sup>2</sup> *Ivay v. Hedges*, 9 Q.B.D. 80.

Company and the Caledonian Company, and the question was whether the Caledonian Company was liable. There was an allegation that the Caledonian Company knew that the waggons were hauled, as before mentioned, to the gas-works, and that this was done by the Caledonian Company's permission. It was contended, that as the Caledonian Company knew of and assented to this arrangement, it was the duty of this company, when the waggons were handed over by them to the Glasgow Company in order that the latter company might haul them to the gas-works, to examine the waggons to see that they were in a proper condition ; that the Caledonian Company had handed the waggons over without such examination, which, if it had taken place, would have shown that they were not in a proper condition ; and that, therefore, any one in the Glasgow Company's employment, who was injured whilst they were being used by the Glasgow Company, might sue the Caledonian Company for injuries sustained by the breach of this duty. It was, however, held that no such duty had been established as against the Caledonian Company. The difference between this case and *Heaven v. Pender* is clearly marked. In that case the staging, which was part of the apparatus of the dock company, was being used for dock purposes. Its defective condition constituted a "trap" to any one who went upon it, and the plaintiff was "invited" to go upon it. But in the *Caledonian case* all these circumstances were wanting. The waggon was being used on a new journey, with which the Caledonian Company had nothing to do, by the Glasgow Company for its own purposes ; there was no trap permitted to exist by the Caledonian Company, and no invitation by that company to the deceased. Nor could the case be put on the further ground that the cause of the accident was a dangerous instrument which might lead to an accident by being handled. That the Glasgow Company was liable was not disputed. *Elliott v. Hall*, 15 Q.B.D. 315 (*ante*, p. 58), was also clearly distinguishable ;

Distinction  
between  
*Caledonian Rail-  
way case*  
and  
*Heaven v.  
Pender*.

for the truck in that case was being used as part of the purpose for which it was originally sent out, when the injury occurred.

Where duty imposed, though it is delegated to a contractor, liability still continues, in some cases.

Liability of owner of stand to which persons are admitted on payment.

It has been already stated (*ante*, p. 48) that the duty of one in occupation of premises or in possession or control of chattels, to take care that they do not become dangerous to those whom he intends to come on the premises or to use the chattels, is not a duty based on ownership. An occupier or an owner cannot, however, rid himself of this duty by employing a perfectly competent person to maintain the premises or things in repair; they have to be in a reasonably safe condition as a fact, irrespective of any personal efforts on the owner's part, or that of his servants', or of an independent contractor, to make them so. Thus in *Francis v. Cockerell*, L.R. 5 Q.B. 184, 501 (*ante*, p. 54),<sup>1</sup> though the defendant was personally free from negligence, and had employed a competent person to erect the stand, which was, in fact (but not to the defendant's knowledge), negligently and improperly erected, he was liable. That case was one where contractual relations existed between the plaintiff and the defendant; and it was held that there was an implied warranty, that due care had been used in the construction of the stand by those whom the defendant employed to erect it, as well as by himself; in analogy to the liability of a carrier as explained in *Redhead v. Midland Ry. Co.*, L.R. 4 Q.B. 379; and the Court adopted the proposition of Parke, B., in *Sharp v. Grey*, 9 Bing. 457: "It cannot be contended that the defendants were not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge." It is to be noted that there is no analogy between the letting of a seat on a stand, and the letting of a house. In the latter case, the rule is *caveat lessee*: *Erskine v. Adeane*, L.R. 8 Ch. at p. 761.

Job-master's liability.

Where a jobmaster lets out a carriage on hire, there is

<sup>1</sup> See also *Kiddle v. Lovett*, 16 Q.B.D. 605.

also an implied warranty by him that the carriage is reasonably fit for the purpose for which it is hired; and where such a warranty exists, the duty is a more onerous one than is ordinarily imposed. In the case of *Hyman v. Nye*, 6 Q.B.D. 685, a bolt under the carriage broke during the journey, and this displaced the splinter-bar. In consequence, the horses started, the carriage was upset, and the plaintiff injured. The judge who tried the case directed the jury that if they found that the defendant took all reasonable care to provide a fit and proper carriage, they were to find a verdict for him; as it was on the plaintiff to prove that the injury was caused by the defendant's negligence. Upon this direction, the jury found for the defendant. They found that the carriage was reasonably fit for the purpose for which it was hired, and that the defendant could not by ordinary care and attention have detected the defect in the bolt. This direction, which would have been applicable to a case where no warranty of fitness arose, was held on appeal not to have gone far enough. The defendant's duty was to supply a carriage as reasonably free from defects as care and skill could make it. The negligence being a breach of duty, the judge below had not properly explained to the jury the nature of the duty. The duty being as defined, and the carriage having broken down while being properly used, it was for the defendant to show that the accident was one which could not have been prevented by any care or skill. The question which ought to have been left to the jury was whether the carriage was in fact reasonably safe; and a new trial was ordered. In *Randall v. Newson*, 2 Q.B.D. 102, it had already been held by the C.A., after reviewing the cases, that on the sale of an article for a specific purpose, there is a warranty that the thing is fit for the purpose, and there is no exception as to latent undiscoverable defects, such as was introduced in the contract to carry in *Redhead v. Midland Ry.* (post, p. 116). The

Liability  
in respect  
of articles  
sold for a  
specific  
purpose.

plaintiff had bought of a coach-builder a pole for his carriage. It broke in use, and the horses were injured. In an action for damages, the jury found that the pole was not reasonably fit for the carriage; but that the defendant had not been guilty of negligence. The plaintiff was held entitled to recover the value of the pole, and also damage for the injury sustained by the horses, provided that the jury, on a second trial, found that the injury to the horses was the natural consequence of the defect in the pole.

But these cases just cited depend on an implied warranty, arising out of the contract, not only to use due care personally, but also that the person employed to carry out the duty has used due care. The liability in respect of duties performed by a contractor, where no contractual relations exist between the injured person and the person on whom the duty lies, will be noticed in the next chapter.

Bailee for hire: no implied warranty.

Where, however, a man is in the position of an ordinary bailee for hire, such as a livery-stable keeper, and receives a carriage to be lodged in his coach-house, his duty, as will be seen when we deal with bailees for hire (*post*, p. 231), is less stringent. If the coach-house is negligently built by a contractor, and the defendant has exercised ordinary care as a prudent man in the choice of the contractor; then if the coach-house falls in by reason of its negligent construction, and injures the carriage, the defendant is not liable, because no warranty is implied. As he was a bailee for hire, there was no implied warranty by him that the building was absolutely safe: *Searle v Laverick*, L.R. 9 Q.B. 122.

## CHAPTER VI.

### *Delegated duties (continued)—Casual or collateral negligence—Independent contractor.*

CASES with regard to liability in respect of duties delegated to a contractor, do not only depend on a contract which implies a warranty not only to use due care personally, but also that the person employed to carry out the duty has done so with care. Even where no contractual relations exist between the plaintiff and the defendant, the liability of the defendant, for a breach of duty, which he has deputed an agent to perform, is upheld. The principle is, that where a duty is imposed requiring a person to see that reasonable care and skill is exercised, he cannot relieve himself of responsibility by delegating the performance of that duty to some one else.

Liability for contractor's negligence where no contractual relations exist between plaintiff and defendant.

Where a man orders work to be done, lawful in itself, and from the doing of which no injurious consequences to others is likely to follow, if damage arises from the contractor's negligence or that of his servants who are executing the work, the contractor, and not the employer, is liable. But where the lawful work ordered to be done would in the natural course of things lead to injurious consequences, unless means are adopted to prevent such consequences, there is a duty on the employer to see that reasonable skill and care are exercised; and he cannot relieve himself of responsibility by delegating that duty to another.<sup>1</sup>

"There is an obvious difference," said Cockburn, C.J., in

<sup>1</sup> *Bower v. Peate*, 1 Q.B.D. 321; *Hughes v. Percival*, 8 App. Cas. 443; *Pickard v. Smith*, 10 C.B., N.S. 479.

*Bower v. Peate*, "between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

"Casual" negligence of contractor.

Where the accident occurs through what has been called the "casual or collateral" negligence of the contractor, a state of things which could not reasonably be guarded against beforehand, the contractor's negligence in such a case cannot be laid to the charge of the employer; and the contractor is alone liable.<sup>1</sup>

It is to be observed, however, that this does not apply where the work is carried out, not by an independent contractor, but by a servant of the person doing it; for the master is liable (as we shall afterwards see) for any collateral negligence of his servant, so long as it occurred in the course of, or incidentally to, his employment.

What "casual" negligence is.

What constitutes a "casual or collateral" act of negligence by the contractor, may be illustrated by the circumstance of his leaving, for instance, a spade, or a pickaxe, on the road he is engaged in making up or dealing with. This would be a casual act. But where he leaves heaps of soil or stones, unlighted and unfenced on the road where he is carrying out his work, this is not "casual or collateral" negligence; it being, in fact, incidental to the very work he is engaged upon; or, in other words, the contractor

<sup>1</sup> *Pickard v. Smith* (*ante*, p. 83).

is performing for the employer the duty he has himself to discharge; and he cannot rid himself of his liability in respect of that duty by employing some one else to discharge it. But if the contractor does perform that duty, it is also performed by the employer through the contractor; and the employer is only responsible for its proper performance by the person to whom he has delegated it: *Penny v. Wimbledon Urban District Council* (1899), 2 Q.B. 72. From the nature of the work in *Penny's case*, where the contractor was employed by the defendants to make up a highway, danger was likely to arise to the public using the road, unless precautions were taken. The negligence of the contractors in leaving a heap on the road unlighted, was therefore not a casual act of negligence, but one inherently connected with the execution of the work they were engaged to perform; and the defendants were held liable for an injury the plaintiff had sustained by the contractor's negligence. Again, where a District Council constructing a sewer by their statutory powers, employed a contractor to do the work, in consequence of whose negligence in executing it a gas-main was broken; and gas having thereby escaped into the plaintiff's house, an explosion took place, and the plaintiffs were injured; the Council were held liable (*Hardaker v. Idle District Council* (1896), 1 Q.B. 335); for it was part of their duty in constructing the sewer, not to break gas-pipes which they cut under; and they could not free themselves from responsibility by employing some one else to perform the duty.

On the other hand, where the defendants employed a contractor to build a bridge, and one of the contractor's men carelessly let a stone fall on the plaintiff; this was a casual or collateral act of negligence on the contractor's part, for which, therefore, the defendants were not liable: *Reedie v. L. & N.W. Ry.*, 4 Ex. 244. But where the defendants' duty was to build a bridge which would open so as to let vessels pass under it; and the contractor built



a bridge which would not open, and the plaintiff thereby suffered damage, the defendants were held liable, as the contractor had not carried out the duty which the defendants had to perform; and the negligent act was not casual, but inherent: *Hole v. Sittingbourne and Sheerness Ry.*, 6 H. & N. 488.

In *Holliday v. National Telephone Co.* (1899), 2 Q.B. 392, it was contended that the plumber through whose negligence the plaintiff, while passing along the highway, was injured, was an independent contractor; and that his negligent act was a casual one, for which the defendants were not liable. As the plumber engaged by the defendants to do the work was doing it under the supervision of the defendants' foreman, and with the assistance of one of their workmen, it was held that the plumber was not an independent contractor, but was jointly engaged with the defendants in doing the work, under circumstances that made the defendants liable for the plumber's negligence. It was further held, that even if he had been an independent contractor, the negligent act was not a casual or collateral one. The plumber was connecting the tubes, through which the wires had been passed, at the joints with lead and solder. In order to do this, it was necessary to obtain a flare from a benzoline lamp; and it was a proper mode of obtaining this flare to dip the lamp into a caldron of melted solder. The safety-valve of the lamp was, however, not in proper working order, as the plumber ought to have known, and the lamp in consequence exploded; and the plaintiff, passing along the highway, was splashed by the molten solder and injured. It was held that the defendants were liable; they were (under their statutory authority) interfering with a public highway, and it was their duty to take care that the public lawfully using the highway, should be protected against any negligence by a person acting for them in the execution of the work: it was not a case of merely

casual negligence, for it was negligence in the very act which the plumber was engaged to perform. There is no distinction between a public highway in this respect, and a road which may be, and, to the knowledge of the wrong-doer, probably will be, used by persons lawfully entitled to do so: *Pickard v. Smith*, 10 C.B., N.S. 470; *Penny's case* (1898), 2 Q.B. 212; (1899), 2 Q.B. 72 (*ante*, p. 85).

Further illustrations of this branch of the law as to the liability of the employer for the negligence of the contractor, are to be found in cases where a contractor failed to properly light a sunken wreck he was engaged in raising;<sup>1</sup> where a contractor neglected to make good a pavement under which he had constructed a drain;<sup>2</sup> where a lamp overhanging a highway fell on the plaintiff because it was out of repair, although a competent person had been employed to repair it;<sup>3</sup> where a wall had been let down, causing damage, by the defendant's contractor, it being the defendant's duty not to let it down, and to take the necessary care to prevent injury arising from the work, which was dangerous in itself, unless proper precautions were taken;<sup>4</sup> and where the plaintiff's crops were burnt by a fire lighted on the defendant's land, an operation attended with danger, which had not been sufficiently guarded against.<sup>5</sup>

The ordinary rule, subject to the points we have been considering, is that a person is not responsible for the negligence of an independent contractor. Accordingly, where the work to be executed could not, in the natural course of things, lead to injurious consequences, and the

The rule as to liability for negligence of an independent contractor.

<sup>1</sup> *The Snark* (1900), P. 105.

<sup>2</sup> *Gray v. Pullen*, 5 B. & S. 970.

<sup>3</sup> *Tarry v. Ashton*, 1 Q.B.D. 314.

<sup>4</sup> *Bower v. Peate* (p. 83); *Dalton v. Angus*, 6 App. Cas. 740, 829; *Hughes v. Percival*, 8 App. Cas. 443.

<sup>5</sup> *Black v. Christchurch Finance Co.* (1894), A.C. 48.

work is done by an independent contractor, he and not his employer, is liable for negligence in executing the contract; because, the work being of that nature, no such duty is imposed on the person for whom the work is done, as arises where injury might be expected to happen, to take the necessary steps to avoid anticipated danger. (See *Bower v. Peate* (*ante*, p. 83).)

Liability  
as between  
contractor  
and sub-  
contractor.

The case of *Pearson v. Cox*, 2 C.P.D. 369, where a question of liability arose as between a contractor and a sub-contractor, incidentally disclosed some difference of opinion amongst the judges as to where responsibility lies, when the accident can be said to be one which ought reasonably to have been foreseen. The defendants were builders who, after the outside work of a house was finished, properly removed the hoarding. The internal plastering remained to be done, and this work the defendants employed a sub-contractor to do. One of the sub-contractor's workmen, while walking inside, shook a plank, which caused a tool to fall out of a window of the house, and in falling it injured the plaintiff, who was passing along the highway. It had been found as a fact by the jury, that the defendants were not negligent in removing the hoarding; but that the injury was caused by their negligence in not providing some other protection to the public. The C.A., in holding, upon the facts, that no duty was imposed either upon the sub-contractor, or upon the defendants to provide any such protection; also held that if a general duty was imposed upon the defendants to guard against accidents, that must mean accidents which could reasonably be foreseen. The falling of a tool in this manner is not a probable incident to occur in plastering the inside of a house, so that it could reasonably have been anticipated. Bramwell, L.J., said it could not be held, as a matter of law, that plastering rooms involves such presumable danger to passers-by that, unless some protection is afforded, it is a nuisance to the highway.

So far this is in accord with the other decisions on the subject. But a difference arose when the Court put before itself the solution of a hypothetical question. Coleridge, C.J., while agreeing that the falling of a tool in this way is not a probability reasonably incident to the work which was being done, said, however, "If it was so, that would be a ground for holding some one liable; but if any one is liable for not providing some protection it would be the sub-contractor." But, on the assumption that the accident was one which ought reasonably to have been foreseen, it would seem from the decisions, that the duty of guarding against it would be on the man who had ordered the work to be done; and as between the contractor and the sub-contractor, the contractor was the one in that position. Bramwell, J., also thought that if such a duty (*viz.* that of providing against a reasonably foreseen accident) did arise, it would be the duty of the person whose conduct was a nuisance to the highway. "I agree that the general builder," he said, "would be the person who is to guard against general dangers in the course of the building; but this, according to the opinion of the jury, is not such an accident. But even," he proceeded to add—"but even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable." There again, upon the assumption that a contractor has employed a sub-contractor to do work which was in itself dangerous to the public unless sufficiently guarded against, the other cases would seem to show that the person ordering the work has that duty imposed upon him. Brett, L.J., took a different view of this hypothetical proposition. If there had been evidence that the accident might probably happen while such work was going on, "then," he remarked, "with all deference to what has been said (by the other two judges), I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public,

as they had control over the whole building." The point, as it will be observed, was only "academically" discussed, because it did not arise on the evidence; but it is interesting as showing a difference of judicial opinion upon a state of facts which might conceivably arise.

## CHAPTER VII.

*When breaches of statutory duties give a right of action—  
Public bodies—Highway authorities.*

ANOTHER instance, besides those we have been considering, where a defendant cannot rid himself of responsibility by employing an independent contractor to do the work, is where a statutory duty is imposed upon him, as in *Gray v. Pullen*, 5 B. & S. 970. The reasoning on which this case is based was disputed in *Wilson v. Merry*, L.R. 1 Sc. H.L., by Lord Chelmsford, at p. 341. While admitting that the statutory duty there was created absolutely, he considered that the statute only provided a penalty for its non-performance; a penalty recoverable against the owner or occupier. But he did not think that this made the owner civilly responsible, where he is in no legal sense a principal or master of the person doing the act complained of. *Groves v. Wimborne* (1898), 2 Q.B. 402, is another case based on a failure to perform a statutory duty imposed for the benefit of the person injured; in which case—where the statute is applicable, as afterwards mentioned—there is no need to prove negligence in order to establish the cause of action.<sup>1</sup>

In the cases of *Williams v. G.W. Ry.*, L.R. 9 Ex. 157, where no gate had been erected at a level crossing; and *Stapley v. L.B. & S.C. Ry.*, L.R. 1 Ex. 21 (affirmed in *Wanless v. N.E. Ry.*, L.R. 6 Q.B. 481), where gates were left open; the defendants neglected to perform a statutory duty imposed upon them for the protection of the public, and were

<sup>1</sup> And see *Baddeley v. Granville*, 19 Q.B.D. 423 (*post*, p. 200).

held liable; the accident which happened, being able to be reasonably connected with the act of negligence.

A breach of statutory duty does not always give a right of action to the person damaged by the breach.

The mere fact that the breach of a public statutory duty has caused damage, does not, however, always give a cause of action to the person injured, against the person guilty of the breach. Whether the breach does or does not give this right, depends on the object and language of the statute: *Atkinson v. Newcastle, etc., Waterworks*, 2 Ex. D. 441; and see *per* Lord Herschell, *Cowley v. Newmarket Local Board* (*post*, p. 95). The whole "purview of the Legislature in that particular statute" must be regarded, said Lord Cairns. Accordingly, the cases show, that where it is proved that a statutory duty has been neglected by the defendant, whereby injury results to the plaintiff, the plaintiff will have established a *prima facie* case, unless it appears from the whole "purview" of the Act, that the intention is to make the enforcement of the penalty imposed by the Act the only remedy for the breach of the statutory duty. (See also *Great Northern Fishing Co. v. Edgehill*, 11 Q.B.D. 225; *Vallance v. Falle*, 13 Q.B.D. 109; *Glossop v. Heston Local Board*, 12 Ch. D. 102; *Att.-Genl. v. Dorking*, 20 Ch. D. 595).

The language of the statute, too, may show that no private right of action is given to meet the particular grievance complained of. Thus, in *Ward v. Hobbs*, 4 App. Cas. 13 (*ante*, p. 60), where the Contagious Diseases (Animals) Act prohibits the sending of infected animals for sale in a public place, and a breach of that provision had been committed; it was held that this gave no right of action to a purchaser, who, having bought these animals in a public place, found that, on placing them with his other animals on his own farm, the latter afterwards became infected with the disease by the animals he had purchased in a public place.

Where the statutory duty lies on one person, another cannot be liable for damage arising from a breach of this

duty. A railway company let surplus lands to a tenant, which it was their statutory duty to fence from the adjoining land which they had not taken. The tenant planted his land with vegetables, and the defendant kept horses on the adjoining land. By reason of the insufficiency of the fence, the defendant's horses put their heads through and over the fence, and damaged the tenant's crops. The defendant was held not to be liable to the tenant; as the duty of fencing, being by statute imposed on the railway company, the defendant was not responsible to their tenant for the trespass of his cattle: *Wiseman v. Booker*, 3 C.P.D. 184.

Where a Public body is constituted by statute to control public works, the liability for negligence of such bodies (who are substituted for individuals) is, to the extent of their corporate funds, the same as that imposed by the general law on the owners of similar works; unless the Act which creates the Corporation shows a contrary intention. And this is so, whether the Corporation carries on the works for the purpose of making profits, or not for profit, and merely as trustees for the benefit of the public. This was held in the House of Lords so long ago as 1866 in the case of *The Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 93.<sup>1</sup> A dock company constituted by statute, constructed and kept open for the public benefit (not for the purpose of trade profits) a dock and harbour; and the common-law was held to impose upon the proprietors the duty to take reasonable care, so long as they kept it open for the public use, that it might be navigated without danger. The trustees, knowing, or having had the means of knowing, that the dock and its entrance was unfit to be used by ships, because mud had been allowed to accumulate, did not take reasonable care to put the dock in a fit state, and negligently allowed it to remain unfit. In

Statutory  
duties:  
liability  
of Cor-  
porations  
and Public  
bodies.

<sup>1</sup> See also *Coe v. Wise*, L.R. 1 Q.B. 711; and as to liability for negligence of The Trinity House Corporation: *Gilbert v. Corporation of Trinity House*, 17 Q.B.D. 795.



consequence of this, the plaintiff's vessel was damaged, and his action for negligence against the defendants, the trustees of the docks, was held to be maintainable, and damages to be recoverable from them to the extent of their funds. This principle was also applied to an executive government (New Zealand), which possessed the control and management of a tidal harbour (with authority to remove obstructions) which the public had a right to use; and who also possessed staiths and wharves, and received wharfage and tonnage dues for their use. This was held to impose upon the executive government the duty of taking reasonable care that vessels using the staiths might do so without damage to the vessels: *The Queen v. Williams*, 9 App. Cas. 418.

In the same way, where a towing-path was negligently left in disrepair by the Conservators of the Thames (*Winch v. Conservators of the Thames*, L.R. 7 C.P. 458; affirmed 9 C.P. 378), they were held liable. And where a duty is imposed on the defendants to remove wrecks from a harbour and channel, or to mark its position by buoys, they will be liable in damages, if they have neglected this duty, to a plaintiff whose vessel was injured in consequence of this neglect: *Dormont v. Furness Ry. Co.*, 11 Q.B.D. 496. The case of *Forbes v. The Lee Conservancy Board*, 4 Ex. D. 116, was decided by Pollock, B., in favour of the defendants, who had left a submerged pile in part of the river under their control, by which the plaintiff's barge was injured. But this case was decided upon his construction of their Act, that the duty to remove obstructions was discretionary and not compulsory. It would also appear from a note in the report (pp. 121-2) that the learned judge misread the statement of claim.

In actions against public authorities it is necessary to have regard to the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which collected and amended the statutory provisions dealing with the protection of persons

acting in the execution of statutory and other public duties, and repealed portions of a large number of statutes.

It was years ago held that at common-law an action could not be maintained by one of the public in respect of an injury suffered by him in consequence of a highway being out of repair.<sup>1</sup> The decision proceeded largely on the technical ground, that the inhabitants are not a corporation, and cannot therefore be collectively sued; but it also proceeded on the principle that, as the highway ought to be repaired by the public, an injury arising from its want of repair cannot be the subject of a private action. But whatever the reasons may be by which that decision was arrived at, it has long been held that a surveyor of highways is not liable for the breach of his duty to keep the highway in repair; and that there is nothing in the Public Health Acts, which vest the streets and highways in the Local Board, and give them the office of surveyor of highways with all his rights, duties, and liabilities, which create any new liabilities. A Local Board of Health, therefore, are not liable in an action by one of the public for what is termed non-feasance; that is, permitting the highway, contrary to their duty, to get into disrepair; the remedy is by an indictment. But for acts of misfeasance, such as placing obstructions on the highway, an action would lie for injury thereby occasioned.<sup>2</sup> In *Gibson v. Mayor of Preston*, L.R. 5 Q.B. 218, an attempt was made to show that the Public Health Act of 1848 made the Local Board liable to a person suffering through the non-repair of a highway; but in a carefully considered judgment, in which the cases were examined and reviewed, it was held unanimously by the Court, that no such liability existed. The point again came up for consideration in the case of *Cowley v. The Newmarket Local Board*, in the House of Lords,<sup>3</sup>

Repairs of highways, liability for.

Highway authorities are not liable for non-feasance, but only for misfeasance.

<sup>1</sup> *Russell v. The Men of Devon*, 2 T.R. 667.

<sup>2</sup> *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 214.

<sup>3</sup> (1892), A.C. 345 (*ante*, p. 92).

under the Public Health Act, 1875, when *Gibson's case* was approved, and the same result arrived at. In his speech delivered in this case, Lord Herschell took occasion to express his approval of the view taken in *Atkinson v. Newcastle Waterworks* (*ante*, p. 92), that it is not accurate to state as a broad proposition, that when a statutory duty has been neglected, any one thereby injured can maintain an action for damages against the person on whom the duty is imposed. He agreed with Lord Cairns, that much depends "on the purview of the Legislature in the particular statute, and the language which they have there employed." An action for non-repair of a highway will not lie against a vestry appointed under the Metropolitan Management Act (18 & 19 Vict. c. 120);<sup>1</sup> and it may be taken generally as to all public corporations to which an obligation to keep public roads and bridges in repair has been transferred, that no action will lie against them in respect of mere non-feasance, unless an intention to impose such liability is shown by the statute creating them.<sup>2</sup> The decisions, however, that public bodies are not liable to individuals for acts of non-feasance, do not apply where the public body is under contract with the individual for remuneration.<sup>3</sup>

Whether the act is one of non-feasance or of misfeasance has to be determined as a fact.

But a position of things often arises in which it is necessary to determine, as a point of fact, whether the negligent act is one of non-feasance or of misfeasance. Considered from the point of view of negligence, the distinction between an act of omission and an act of commission is a purely arbitrary one. The one is as much an act of negligence as the other. Moreover, in one sense it might be said, that to omit to do what it is your duty to do—as to neglect to keep a road in repair which it is your

<sup>1</sup> *Parsons v. Vestry of St. Matthew*, L.R. 3 C.P. 56.

<sup>2</sup> *Municipality of Picton v. Geldert* (1893), A.C. 524; *Municipal Council of Sydney v. Bourke* (1895), A.C. 433.

<sup>3</sup> *Brabant v. King* (1895), A.C. 632.

duty to maintain in repair—is as much misfeasance as non-feasance: and, on the other hand, that not to keep a road free from obstruction, which it is your duty to keep unobstructed, is as much non-feasance as misfeasance. It must, therefore, often be that acts of non-feasance and of misfeasance blend in such a way, as to blur the artificial distinction between them.

The difficulty of practically drawing a dividing-line between the two, is illustrated by the case of *Bathurst v. Macpherson*, 4 App. Cas. 256. A municipality, to whom the construction and management of the roads and streets was by statute transferred, had constructed a drain under the street which they allowed to fall into disrepair. This caused a hole to form in the street, into which the plaintiff and his horse fell, and were injured. It was held that the plaintiff could maintain an action against the municipality. This case seems to run counter to the established decisions, by holding the defendants liable for an act of non-feasance, viz. not keeping the road in repair. It was, however, subsequently explained,<sup>1</sup> by stating that the governing fact of the decision was, that the judges who decided it regarded the act complained of as one of misfeasance, and not of non-feasance. The explanation was worked out as follows: the municipality having under their powers constructed a drain which would cause a nuisance to the highway unless kept in proper repair, they were bound to keep their artificial work so as not to cause a nuisance; and as they had neglected to do so, and caused thereby a nuisance in the highway, and were well aware that the nuisance existed, they were as much liable for a misfeasance as if they had directly made a hole in the road which constituted a nuisance to the highway. The line here drawn between non-

<sup>1</sup> *Municipality of Pictou v. Geldert* (supra); *Municipal Council of Sydney v. Bourke* (1895), A.C. 433; *Lambert v. Corporation of Lowestoft* (1901), 1 Q.B. 590.

feasance and misfeasance would appear to be a slender one.

Road and  
water  
authori-  
ties.

*Kent v.  
Worthing  
Local  
Board*  
over-  
ruled.

The law  
on the  
point de-  
clared to  
be unsatis-  
factory by  
Lindley,  
L.J.

There are numerous decisions as to the liability of corporations, who besides being the road authorities are also the owners of the sewers, or are both the highway and the water authorities. Where an iron cover of a valve connected with a water main had been properly fixed in a highway by the defendants, who were both the road and the water authority, but by ordinary wear of the highway the valve-cover projected above the road, and the plaintiff's horse stumbled over it and was hurt; it was held in *Kent v. The Worthing Local Board*, 10 Q.B.D. 118, in accordance with *White v. Hindley Local Board*, L.R. 10 Q.B. 219, that the plaintiff was entitled to recover; although the breach of duty there would appear, according to the ordinary classification, to have been an act of non-feasance. This case was, however, questioned in *Moore v. Lambeth Waterworks*, 17 Q.B.D. 462, and overruled by the C.A. in *Thompson v. Mayor of Brighton* (1894), 1 Q.B. 332, which was a similar case. The road there had been allowed to wear away by the defendants, who were the road and sewer authorities, so that the cover of one of the manholes of a sewer projected above the roadway. The plaintiff, whose horse stumbled over it and was injured, was not allowed to succeed. The breach of duty was omitting to keep the road in repair; and, it was held, that was the only breach of duty through which the accident occurred. This being a mere non-feasance on the defendants' part, they were not liable. "But for the only breach of duty which can be imputed to the defendants," said Lindley, L.J., "I am now compelled to say that no action lies. The law on this subject is, in my opinion, very unsatisfactory; but I cannot on that account declare it to be different from what it is."

*Lambert v. Lowestoft Corporation* (1901), 1 Q.B. 590 (*ante*, p. 97), also laid down that a local sanitary authority,

in whom a sewer is vested by the Public Health Act, 1875, is not, in the absence of negligence, liable for an accident caused to a person passing along the highway owing to the sewer having got out of repair. A properly and carefully constructed sewer was made by private persons under the highway. Subsequently the sewer became vested in the defendants, and by the Act of 1875 the duty of repairing and keeping it so as not to be a nuisance was imposed upon them. The mortar in one of the joints of the sewer was worked away by rats, and this caused a cavity to form below the surface of the road. The existence of this cavity was not known to the defendants, and could not by reasonable care have been discovered by them. The plaintiff's horse, whilst passing along the road, broke through the crust of the road into the cavity, and was injured. The defendants were held not to be liable. Lord Alverstone, C.J., explained Lord Herschell's remarks in the *Sydney case* (*ante*, p. 96), in the passage quoted from it *infra*, by saying that it must be construed with reference to the subject-matter under discussion, and was not intended to lay down any general rule, that simply because an accident has occurred in a road due to a latent defect in a sewer, the defendants, whose duty it is to maintain the sewer, are liable apart from negligence. The passage cited from Lord Herschell's judgment was one where he was dealing with the *Bathurst case* (*ante*, p. 97). Lord Herschell said: "The *ratio decidendi* [of the *Bathurst case*] was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as

much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided. If any person other than the defendants had lawfully made the drain and the same result had ensued, such person would undoubtedly have been liable to an action, just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them, and certain powers or duties in relation to its repair are committed to them?" But, as Lord Alverstone pointed out, in the *Bathurst case*, not only might the plaintiff have recovered on the ground of negligence, but the defective drain had caused the road to become dangerous, and no steps had been taken by the defendants to prevent accidents, although they knew of the condition of the road. In *Lambert's case* the defendants had no such knowledge, nor could they by the exercise of reasonable care have gained it. In *Whyler v. The Bingham Rural District Council* (1901), 1 Q.B. 45, the highway authority had done an act which amounted to a misfeasance, and were consequently held liable. They had removed a former fence which had been placed to protect the public using the highway, which was dangerous owing to its liability to be flooded. Shortly after the fence, on the advice of their surveyor, had been removed, the road was again flooded, and a man driving along it, drove into the ditch and was drowned. It was found as a fact by the jury, that the removal of the fence, and the way in which it had been done, was inconsistent with reasonable regard for the safety of persons using the road.

In *Victoria Corporation v. Patterson* (1899), A.C. 615, an act of misfeasance had been committed, by an officer of the defendant corporation, in weakening a beam which supported a public bridge; and thus a right of action accrued to the person injured by the bridge giving way.

While tramway companies are bound under the Tramways Act, 1873 (s. 28), to keep in repair the road between the lines, and eighteen inches beyond on each side; they can also, under the provisions of the twenty-ninth section, enter into a contract with the road authority to do these repairs. If they have entered into such a contract, the liability for injuries caused through non-repair to persons using such portion of the road is transferred to the road authority.<sup>1</sup> This, therefore, forms an exception to the statement (*ante*, p. 95), that a local authority is not liable for non-repair of a highway. The accident to the plaintiff's carriage in *Howitt's case* (*infra*), for the damage to which he brought his action, arose from a rail projecting, owing to the road being out of repair. The duty to repair was thrown by the Act on the tramway company, and they have power, under the Act, to transfer that duty to the local authority, by entering into a contract with the Authority to do these repairs. The ordinary liability of the Authority is thereby disturbed; just as it was in *Brabant v. King* (*ante*, p. 96).

Exception to non-liability for non-repair.

The fulfilment of the statutory duty enacted, does not in all cases, and under all circumstances, conclude the obligation imposed. There are many cases where a railway company is bound to take extraordinary precautions beyond those imposed by statute, owing to special dangers. Where a sharp corner, or any other cause prevents persons, who exercise

Other duties beyond those imposed by statute may arise.

<sup>1</sup> *Howitt v. Nottingham Tram Co.*, 12 Q.B.D. 16; *Aldred v. West Metropolitan Tram Co.* (1891), 2 Q.B. 398; *Barnett v. Poplar Corporation* (1901), 2 K.B. 319.



ordinary prudence, from avoiding the danger of an approaching train;<sup>1</sup> and where a dark and foggy morning, at a place which was further obscured by smoke from neighbouring works, prevented persons, who used ordinary care, from seeing approaching trains;<sup>2</sup> the state of things rendered it necessary to take extra precautions, and as they were not taken, the railway company were held liable. But where, although such extra precautions are not necessary, the defendants nevertheless voluntarily adopt them, Willes, J., in *Skelton v. L. & N.W. Ry.*,<sup>3</sup> was of opinion, that if a person undertakes a voluntary act, he is liable if he performs it improperly; but he is not liable if he neglects altogether to perform it.

Whether  
an action  
lies  
against a  
person  
liable to  
repair  
ratione  
tenuræ is  
doubtful.

Whether an action lies against a person liable to repair a public way *ratione tenuræ*, for special damage suffered by one of the public in consequence of the way being out of repair, was not decided in *Rundle v. Hearle* (1898), 2 Q.B. 83; but, Martin, B., in *Young v. Davis*, 7 H. & N. 760, at p. 773, said he should have been surprised if any case could be found which showed such an action to be maintainable. In *Rundle's case* (*supra*) it was found that the defendant was not liable to repair *ratione tenuræ*. This was the case where a stile in a public footpath was out of repair, whereby the plaintiff was injured. The defendant was the occupier of the fields through which the footpath ran, and had occasionally done slight repairs to the path and to the stile. The mere repair of a fence, or wall, or stile, by a man for his own benefit, will not, *per se*, and although his neighbour may also benefit by such repairs, impose on him any duty to continue to repair for his neighbour's benefit, when he no longer chooses to do so for his own. The habitual repair, however, by a man and his predecessors of a highway which periodically requires

<sup>1</sup> *Bilbee v. L.B. & S.C. Ry.*, 34 L.J.C.P. 182.

<sup>2</sup> *James v. G.W. Ry.*, note 3, p. 634, in the report of *Skelton v. L. & N.W. Ry.*, L.R. 2 C.P. 631.

repair, would be evidence to cast the duty of repairing upon him.<sup>1</sup> But there was held not to be sufficient evidence as regards the repair of the footpath to make the defendant liable to repair *ratione tenuræ*.<sup>2</sup>

<sup>1</sup> *Reg. v. Barker*, 25 Q.B.D. 213.

<sup>2</sup> And see *Hudson v. Tabor*, 2 Q.B.D. 290.

## CHAPTER VIII.

### *The connection between the injury and the alleged negligence.*

The negligent act must be connected with the accident in order to give a cause of action.

FROM a study of the definition of negligence it will be seen, that no action arises if the alleged negligence was not the act of negligence out of which the injury arose. It would hardly seem to require authority to establish the proposition that you may be as negligent as you please in the abstract, but that if the injury which is the subject-matter of the action, is in no way connected with any of those acts of negligence, the action cannot succeed. The difficulty, however, lies in applying that proposition. Thus, if a railway company are guilty of some act of negligence, but there is no evidence to connect that negligence with the accident in respect of which the action is brought, there is no evidence to go to the jury, and the railway company are not liable. Moreover, as the plaintiff is bound to prove affirmatively that the injury was due to the defendants' negligence in order to sustain his action, he does not establish that proof by showing circumstances which are equally consistent both with the existence, and with the non-existence, of negligence. Thus it was held in the House of Lords, in the case of *Wakelin v. L. & S.W. Ry.*, 12 App. Cas. 41, that the railway company were not liable under the following circumstances. The action was brought by an administratrix. A railway line crossed a footpath on the level, and was guarded by gates attended to by a watchman during the day, but there was none placed there during the night. The plaintiff's husband was found

*Wakelin's case.*

dead on the line near the level crossing at night, he having been killed by a train which carried the usual head-lights, but which did not whistle, or give warning of its approach. No evidence was tendered showing how the deceased got on to the line. It was held, that even if it were assumed that there was evidence of negligence by the company, yet there was none to connect such negligence with the occurrence of the accident; and that the company, therefore, were not liable. The evidence given was equally consistent, either with the supposition that the deceased himself ran against the engine, or that the engine ran against him.

The difficulty under which a judge lies in determining, on a complicated state of facts, whether the evidence tending to show negligence is of equal weight with that which tends to negative the existence of negligence, and that, therefore, the matter should be withdrawn from the jury, has often been pointed out by the judges. Unless the application of this rule is tolerably obvious, it is now seldom resorted to; and the question is left to the jury, and ought to be left to them (unless there is no negligence at all), to say what inference is to be drawn. In *Wakelin's case*, however, it was considered to be beyond doubt, that the plaintiff had not proved sufficient to establish a case of negligence against the defendants out of which the accident arose.

Another case, where it was held that the accident was not shown to have arisen out of the defendants' negligence, and the plaintiff's action therefore failed, is *Davey v. L. & S.W. Ry.*, 11 Q.B.D. 213; 12 Q.B.D. 70. But both *Wakelin's case* (*ante*, p. 104) and *Davey's case*, dealt with questions of contributory negligence, which are afterwards discussed (*post*, p. 122). The decisions in *Davey's case*, and subsequently with regard to it, serve well to illustrate how hard it is, even for trained legal minds, to compass the difficulty of applying the rules as to negligence.

Facts  
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with none,  
generally  
left to the  
jury to  
determine.

*Davey's  
case.*

As in *Wakelin's case*, so here, there was a level crossing over a public footpath. In the afternoon of the day of the accident, the plaintiff, while crossing from the down to the up side of the railway, was knocked down at the crossing by the defendants' train on the up line. It was impossible for any one crossing from the down side to see a train coming, until he got within a step or two from the down line, as certain buildings blocked out his view. But any one standing on the down line or the six-foot had an uninterrupted view up and down the line for several hundred yards. The plaintiff said, that before crossing, he looked along the down line, but admitted he did not look along the up line, and that if he had looked, he would have seen a train coming. The engine-driver did not whistle. There was a gate-keeper, a servant of the defendants', at the crossing, standing there talking to some boys, and he had a red flag furled in his hand, but he gave no warning to the plaintiff. His duty was to open and shut the gates for carriages, and not to warn foot-passengers.

Huddleston, B., non-suited the plaintiff. In the Court above, Lord Coleridge, C.J., and Denman, J., thought, on the undisputed facts, there was no negligence by the defendants, and the accident was solely occasioned by the plaintiff's own negligence in not looking along the up line before he crossed it. On the other hand, Manisty, J., thought the case should be left to the jury, as there was evidence of negligence on the part of the defendants, out of which the accident arose. In the Court of Appeal, all three judges thought that there was evidence of negligence by the defendants; but while Baggallay, L.J., said that the feeling in his mind was that there was no contributory negligence on the plaintiff's part, but that he would not go so far as to say there was not evidence of it for the jury, and therefore the case ought to be left to them; the facts presented themselves to the minds of Brett, M.R., and of Bowen, L.J., as showing conclusively, that the plaintiff had

brought about his injury by his own contributory negligence. Nor was this the only difference manifested as arising upon the facts. The plaintiff complained that he had been misled because the gate-keeper (who was standing in a position to see the up train coming) gave him no warning. Baggallay, L.J., admitted that plea, so far as thinking that the jury ought to take that circumstance into consideration in coming to a conclusion whether there was contributory negligence by the plaintiff which would disentitle him to a verdict. The other two judges thought, however, that as it was no part of the gate-keeper's duty to warn foot-passengers, his duty being confined to the statutory one of allowing and preventing carriages crossing the line, it was impossible for the plaintiff to say, even if he had been misled, that in the circumstances any reasonable person exercising ordinary care would have been misled; and he had no right to suppose that the gate-keeper was there for the purpose of warning foot-passengers. It is somewhat curious that in this connection the fact was not ascertained (according to the report) whether the gates were closed or not. Probably if they had been open the plaintiff might have been misled into a feeling of security, while if they had been closed, this ought to have been a warning to the plaintiff, sufficient in itself that a train was approaching.<sup>1</sup> *Davey's case*, however, was subsequently held in *Brown v. G.W. Ry.*, 52 L.T. 622, to have been wrongly decided; the judges in the latter case holding, that if a plaintiff gives evidence of the defendant's negligence, and also evidence which may or may not be considered to be evidence of his own contributory negligence, the case ought not to be withdrawn from the jury; and they followed the case of *Wright v. M. Ry.*, W.N. Feb. 28, 1885.<sup>2</sup>

<sup>1</sup> As to instances of a plaintiff being misled by the conduct of the company's servants, see further, "Level Crossings" (Chap. xxiv.).

<sup>2</sup> *Note*.—I am informed by the counsel for the plaintiff in *Brown's case*, that the case went to the Court of Appeal, and was there affirmed; but there appears to be no report of the case on appeal.

Brett, M.R., who took part in the majority judgment given in *Davey's case*, is reported in *Wright's case* to have remarked, somewhat quaintly, when there referring to *Davey's case*: "That if it is any pleasure to anybody to hear him say so, after mature consideration he considered that Manisty, J. (the dissentient judge below), and Baggalay, L.J. (who dissented in the Court of Appeal), were right in that case, and his judgment was one he regretted."

The judicial discrepancies of opinion in this case are sufficient to make no one despair of being right, or discouraged by being wrong, in applying the law of negligence to the facts upon which he has to advise.

## CHAPTER IX.

### *The doctrine of presumptive negligence.*

ALTHOUGH it is necessary for the plaintiff to give affirmatively some evidence of the defendant's negligence upon which to base his case, sometimes the happening of the accident is in itself evidence of negligence; *res ipsa loquitur*, and a case of negligence is established calling upon the defendant for an explanation. In these cases the accident is of such a nature, that no evidence of negligence is necessary to make a *primâ facie* case; for a presumption of negligence arises from the mere fact of the accident. When this occurs, while it is of course open to the defendant to show that the accident was not due to his negligence or that of his servants, if no such explanation is given, the plaintiff will have established his case and be entitled to a verdict. The facts must lead to the presumption, both that an act of negligence has occurred, and also that such negligence is attributable to the defendant; and if they do, a *primâ facie* case is established. It would be unreasonable in such a case, where the plaintiff has no means of knowing how the injury was occasioned, while the defendant has all those means and withholds them, to require the plaintiff to prove anything beyond the happening of the accident.

Thus, while a plaintiff was walking along a street before a flour-dealer's premises, and was injured by a barrel of flour falling upon him from an upper window, it was held that this was a case where the mere fact of the accident, without proof of the circumstances under which it occurred,

A barrel of flour falling on plaintiff as he is walking in the street,



raises a  
*primâ*  
*facie* case  
of negli-  
gence.

was evidence of negligence to go to the jury in an action against the flour-dealer for his or his servants' negligence. It was clear that the barrel of flour was in his custody, and he is responsible for his servants who had control over it. A *primâ facie* case thereupon arose from the fact of the barrel falling on the plaintiff; and the plaintiff was not to be called upon to show how it fell: *Byrne v. Boadle*, 33 L.J. Ex. 13. "No doubt," said Bramwell, B., "the presumption of negligence is not raised in every case of injury from accident; but in some it is. We must judge of the facts in a reasonable way; and regarding them in that light, we know that these accidents do not take place without a cause, and in general that cause is negligence."

Accident  
at a  
station,  
through  
plank  
falling  
through  
the roof  
on to the  
plaintiff:  
presump-  
tions of  
law.  
*Welfare's*  
case re-  
viewed.

*Welfare v. L. & B. Ry.*, L.R. 4 Q.B. 693, illustrates one of the cases where injury from accident does not raise a presumption of negligence; and, in addition, it presents some rather remarkable features. The plaintiff went to the defendants' railway station for the purpose of travelling by their railway, and having asked one of their porters about the departing trains, he was directed by him to look at the time-table on a wall under the portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof upon him, and injured him; and at the same time a man was seen on the roof. This was all the evidence the plaintiff gave, and he was non-suited, the non-suit being upheld on appeal. The grounds for this decision were stated variously, apart from the question whether the man causing the injury must be taken to be the company's servant. It was said that the only negligent act suggested was, that the defendants allowed a man to go on their roof when it was not sufficiently strong to bear his weight; but it was not shown by the plaintiff "either that the company knew, or had the means of knowing, or were bound to take steps to know, the state in which the roof was," said Cockburn, C.J. He said, too, that it does not follow because a man is directed to repair a roof, that the person

giving that direction knows the roof to be in such state as not to be able to bear the workman's weight. And he held that, "there is nothing to show an absence of reasonable care on the part of the company to ascertain in what state the roof was." Mellor, J., put it on the ground that there was no "act of negligence on the part of the man on the roof; and it is consistent with all the facts that the falling of the plank and zinc was a pure accident." Lush, J., agreed that the maxim *respondeat superior* could not apply, as there was no evidence that the man was guilty of negligence. Nor was there anything, he considered, to justify the conclusion that the company had been guilty of negligence in allowing the man to go on the roof. Blackburn, J., while agreeing in that view said, in answering the point made on the plaintiff's behalf, that the defendants had a duty to perform towards the plaintiff, and could not relieve themselves of responsibility by employing a contractor;<sup>1</sup> that there was no duty on them to ensure that the plank should not fall. "Their duty is to take reasonable care to keep their premises in such a state as that those whom they invite to come there shall not be unduly exposed to danger." No evidence was given to show that the premises were dangerous, and no evidence that the defendants were aware that the roof was unsafe to send a man on it; and therefore, in his lordship's view, the plaintiff's case was insufficient.

If the injury was the result of a mere accident, that would be a full and complete answer to the case. There would be no negligence by the man on the roof, and therefore nothing in the way of negligence which he could pass on to the company so as to make them liable. But as regards the question whether the defendants had themselves been negligent; should it be necessary, if the injury had not been a mere accident, for the plaintiff to show that the defendants were aware that the roof was not in a state to

<sup>1</sup> See *ante*, p. 83.

bear the man's weight, it seems hardly conceivable that a stranger could ever succeed in showing this; and to hold, as a matter of law, that the defendants had not the means of knowing the condition of their own premises, appears to go rather beyond the other cases dealing with the duties towards persons invited upon premises; and those which show that defendants cannot say that they are ignorant as a fact of a danger, when they have neglected the means of ascertaining it.

There was a further point mooted in this case, but not actually decided, which is noticed later on (*post*, p. 114).

*Scott v.  
London  
Docks.*

*Byrne v. Boadle (supra)* in no way depends upon the fact that it was a highway along which the plaintiff was passing. The same principle was held to apply, where the plaintiff, while on the defendants' premises in the execution of his duty, was injured by some bags of sugar falling on him from a crane fixed over a doorway, under which he was passing. The majority of the judges held that, as the accident was one which did not happen in the ordinary course of things to persons using machinery with proper care, it afforded reasonable evidence of negligence, when no explanation was given by the defendants as to how the occurrence happened.<sup>1</sup>

*Scott's case  
distinguished in  
Moffatt v.  
Bateman.*

This case was distinguished by the Privy Council in the case of *Moffatt v. Bateman*, L.R. 3 P.C. 115, which does not present much similarity to the facts of *Scott v. London Docks Company*. The facts of this case are stated *ante*, p. 62, and they were held not to establish any *prima facie* case of negligence. After describing *Scott's case*, and showing that that case applied where something happened which does not ordinarily happen if proper care is taken, Lord Chelmsford said: "But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and, therefore, no *prima facie* presumption

<sup>1</sup> *Scott v. London Docks Company*, 34 L.J. Ex. 220.

of negligence having been raised, their lordships think that it was necessary for the plaintiff in the case to give affirmative evidence of there being gross negligence on the part of the appellant occasioning the accident." That the accident occurred from any negligence whatever on the defendants' part, the petitioner had not shown.

On the other hand, as an instance of the happening of an event so unusual as to raise a presumption of negligence, *Kearney v. L.B. & S.C. Ry.*, L.R. 5 Q.B. 411, affirmed 6 Q.B. 759, affords an illustration. The plaintiff was passing along a highway under a railway bridge of the defendants'. This was a girder bridge resting on a perpendicular brick wall with pilasters. A brick fell from the top of one of the pilasters, on which one of the girders rested, and injured the plaintiff. A train had just previously passed over the bridge. This was held (with one dissentient, Hannen, J.), in the Queen's Bench, and unanimously in the Exchequer Chamber, sufficient to show a *primâ facie* case of negligence. The defendants' duty was to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway; and so unusual an occurrence as a brick falling, was *primâ facie* evidence of a neglect of this duty, from which negligence could be inferred. Cockburn, C.J., in the Court below, while being of opinion that this was a case to which the maxim *res ipsa loquitur* applied, added: "it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply." The judgment in the Exchequer Chamber did not appear so to characterize it. And when the nature of the duty upon the company is ascertained to be, to keep the bridge in such a state as to be innocuous to persons passing under it, the fact that a brick fell from it after a train had passed over it, does not appear to be a particularly weak case to establish, *primâ facie*, that the defendants had neglected to perform that

duty; when no explanation whatever is given by the defendants to account for the brick falling.

Other instances of presumptive negligence.

Other instances of presumptive negligence arise where a collision occurs between two trains both under the control of the same company;<sup>1</sup> where both train and railway are under the management of the same company;<sup>2</sup> where a door of a railway carriage flies open when the passenger puts his hand upon it.<sup>3</sup> Where a house being repaired or constructed, something falls from it upon a person passing by, which in the ordinary course of doing such work ought not to have fallen; and where an article likely to do damage is put in a wrong place, and damage is done, a *prima facie* case arises against those who are responsible for its being in its right place, and under proper control. These latter instances are put by Pollock, C.B., in his judgment in *Byrne v. Boodle*, 33 L.J. Ex. 13 (*ante*, p. 110). In that case, it may be noted, the defendants' counsel strenuously urged arguments, based on a technical view of the matter, against any presumption of negligence arising; but they were met by the declaration of the judges that the matter must be looked at in a reasonable way; that, reasonably speaking, such accidents are known to arise from some cause, which generally is negligence; and that the plaintiff cannot know how the accident arose; while the defendant does, if he chooses to explain the matter to the jury.

Is it a presumption of law that a person repairing a roof is not the servant of the occupier of the premises?

But in *Welfare's case* (*ante*, p. 110) the question was discussed, whether a presumption arises that a person repairing a roof is the servant of the occupier of the premises. No evidence had been offered that the man on the roof was a servant of the railway company; which was one of the grounds on which the case had been withdrawn from the jury. Cockburn, C.J., said: "I agree that where

<sup>1</sup> *Skinner v. L.B. & S.C. Ry.*, 5 Ex. 787.

<sup>2</sup> *Carpue v. L.B. & S.C. Ry.*, 13 L.J.Q.B. 133.

<sup>3</sup> *Gee v. Metropolitan Ry.*, L.R. 8 Q.B. 161.

a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done; but, in the case of work of this description, it seems to me that that principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this (the accident happened at the London Bridge Station) persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business it is to do it. That being a matter of universal practice, and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point." Blackburn, J., added: "I quite agree with what my lord has said with reference to the normal state of things, that people who are employed to repair roofs are independent tradesmen, and not mere servants; and the onus of proving that this man was the servant of the company was on the plaintiff, and he is not to be presumed to be so; it must be proved because it is an exceptional case."

If this view is sound, it would be taken as a presumption of law, that persons engaged in repairing premises are not the servants of the owner or occupier of the premises, and if an accident arises from the negligence of such persons in the course of their occupation, the occupier of the premises would have no case to answer, until it be shown that the negligent person was his servant; and he is not called upon to prove that the negligent person was not his servant. The test suggested by the C.J. appears to be whether the act complained of was being performed as part of the ordinary business carried on at the premises. If it was not, no *primâ facie* case arises against the

occupier. What kind, and what extent of repairs fall within or outside "ordinary business," or whether everything in the nature of repairs is sufficient to raise the presumption, or whether the presumption arises only as regards repairs to a roof, is undetermined. The difficulty of knowing what "ordinary business" includes, is enhanced in these days, when businesses are becoming "self-contained," in that everything connected with their being carried on, is often now undertaken under one general control. "Universal knowledge" and "universal practice" undergo alterations in the course of time.

Where a coach over-turned, *primâ facie* case made.

In *Christie v. Griggs*, 2 Camp. 79, where a coach over-turned, Mansfield, C.J., said, that the plaintiff had done enough in giving proof of the accident; and that it was for the defendant to prove that the coach was sound, and the coachman skilful. As a general rule, where an accident occurs which, in the nature of things, does not occur without negligence, the onus is upon the defendant to show that it was not occasioned by his negligence. In cases of railway accidents to passenger trains, besides those of collisions between trains of the same company, it is sometimes sufficient to prove the accident in order to establish a *primâ facie* case, which the defendants must answer. But that is, when the facts disclose that something has happened which does not happen when ordinary care is taken; for that is evidence of negligence.<sup>1</sup>

In *Redhead v. Midland Ry.*, L.R. 4 Q.B. 379, in which case the defendants were absolved from liability because the accident arose from the breaking of the tyre of a wheel in which there was a latent defect not discoverable by ordinary skill and foresight, the plaintiff's *primâ facie* case was established by giving proof of the occurrence of the accident. The onus was then on the defendants to show how the accident happened, and that it was not due to their negligence; an onus they discharged by calling

<sup>1</sup> Per Brett, J., *Gee v. Metropolitan Ry.*, L.R. 8 Q.B. at p. 175.

numerous witnesses to show that the tyre had been properly examined without disclosing any defect; that no skill could have detected it; and that it was a fit tyre as far as skill could make it so. But all this the defendants had to do, merely upon the plaintiff proving that he was a passenger, and his train had sustained an accident by which he was injured.

It was suggested in one case, where the plaintiff was in a train which was at a standstill in the defendants' railway station, and was there run into by another train, that because other companies had running powers over the line, the mere proof of the accident did not establish a *prima facie* case of negligence on the defendants' part. The accident, it was urged, might have been the result of another railway company's negligence. But this was held to make no difference. The plaintiff's case was sufficient to call upon the defendants for their answer, and if they desired to exonerate themselves by showing that the accident was entirely due to another's negligence, the mere proof of the accident the plaintiff had met with while a passenger in the defendants' train, was enough to cast the onus upon them of proving this.<sup>1</sup> The presumption was, in the absence of evidence to the contrary, that the train which ran into the plaintiff's train was under the defendants' control.

In *Meux's case* (*ante*, p. 64), where a railway company's porter let a passenger's portmanteau fall on the line, so that it was damaged by a train running over it, this fact supplied in itself presumptive evidence of negligence. "It is not usual," said Esher, M.R., "for porters to let things fall on the line, and unless there were some explanation of how it had happened, any one would say that there was negligence, and we ought so to find."

It will be found throughout the cases, that it always goes to the building up of a *prima facie* case, when no

<sup>1</sup> *Ayles v. S.E. Ry.*, L.R. 3 Ex. 146.



explanation is offered to account for the happening of something, which does not happen in the ordinary course.

*Primâ facie* case against bailee.

In the case of a bailee for hire, who returns the thing hired in a damaged condition, it is, however, not generally sufficient for the bailor to show this, without giving evidence of the bailee's negligence, or, at all events, showing that a reasonable inference arises that the damage was so occasioned.<sup>1</sup> In a case where the plaintiff proved that he let a horse out to hire, and it was returned with broken knees in consequence of a fall while in the defendant's possession, though the plaintiff proved that the horse, which had frequently been let out to hire, had never had a fall before, this did not raise a *primâ facie* case of negligence against the defendant; and no evidence being given by the plaintiff, he was non-suited.<sup>2</sup> But where the damage is such as would generally be attributable only to the hirer's negligence, this would be sufficient to establish a *primâ facie* case against him.

It is always extremely probable that it is not in the letter's power to give specific evidence of the negligent treatment of a thing while it has been in the hirer's custody and control; and this practical difficulty is generally recognized. Only slight evidence of negligence would be required in order to place on the hirer the onus of showing that he had not been negligent, and of explaining how the damage arose. Some evidence, however, from which negligence may at least be reasonably inferred as the cause of the injury, must be given to establish a *primâ facie* case against the hirer.

But in all cases, if the facts do not show that the damage could only have arisen from an absence of ordinary

<sup>1</sup> *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322.

<sup>2</sup> *Cooper v. Barton*, 3 Camp. 5, n. Mr. Beven, in his work on "Negligence," cites some Scotch cases where the onus has been cast upon the hirer merely by proof of the return of the thing hired in a damaged state. Beven on "Negligence," 2nd ed., p. 961, *et seq.*

care, it is necessary for the plaintiff to establish a case from which it may reasonably be inferred that it sprung from the defendant's negligence. "I go further," said Willes, J.,<sup>1</sup> "and say, that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." If the facts proved by the plaintiff leave it in doubt whether the accident arose from the defendant's negligence, or from some other cause, it was said in *Phelps v. G.E. Ry.*, 21 L.T., N.S. 443, that no *primâ facie* case is made. In such case it could not be reasonably inferred that the accident was due to the defendants' negligence.

If the facts are equally consistent with there being negligence, as with there being none, no *primâ facie* case arises.

It is not enough, therefore, to show that damage may have occurred through the defendant's negligence. Where the thing causing the damage is shown not to be under the defendant's control, in contradistinction to *Scott v. London Docks Co.*,<sup>2</sup> where it was under the defendants' management, and the damage must have arisen from some neglect with regard to its management, the principle of presumptive negligence does not apply. A woman was bitten by a dog on the platform of a station belonging to the defendants. The dog had shortly before flown at another woman on the platform, and a little later attacked a cat in the signal-box near the station, and had been kicked out by the porter. Nothing more was seen of the dog until, more than an hour later, it appeared on the platform, and bit the plaintiff. It was not suggested that the company's servants ought to have done anything which they neglected to do, and the dog was shown to be a stray one. It was held, that the jury were not justified in finding that the company had been negligent in keeping the station reasonably safe for passengers.<sup>3</sup>

Nor is it sufficient to establish a *primâ facie* case, to show that a defendant may have been negligent. Plaintiff bitten by a stray dog at a railway station.

<sup>1</sup> *Daniel v. Metropolitan Ry.*, L.R. 3 C.P. at p. 222. The decision in this case was reversed (L.R. 5 H.L. 45), but not on the point that the plaintiff had established a *primâ facie* case.

<sup>2</sup> *Ante*, p. 112.

<sup>3</sup> *Smith v. G.E. Ry.*, L.R. 2 C.P. 4.

*The Omnibus case.*

Where, however, a passenger in an omnibus was injured by one of the horses kicking through the front panel of the vehicle, the duty of a proprietor of a public carriage being to provide fit horses, and a horse that is a kicker being unfit; the mere happening of the accident was considered sufficient to make a *primâ facie* case, without showing that the proprietor was aware of the unfitness.<sup>1</sup> It is true that it was also proved that there were other marks of kicks on the omnibus, and this called for an explanation. But Bovill, C.J., was content to rest his decision on the ground first mentioned.

It is always necessary, in coming to a conclusion whether a *primâ facie* case has been made, to ascertain the nature of the duty of which a breach is alleged. Where, therefore, in the omnibus case, the absolute duty is to supply horses fit for the purpose of safely drawing the vehicle, the mere fact of the accident having been caused by a kicking horse, and therefore one not fit for the purpose, establishes a *primâ facie* case, which calls for an answer.

*Bird v. G.N. Ry.*

The making of a *primâ facie* case of negligence is, of course, not conclusive of the defendant's negligence; but the decision in *Bird v. G.N. Ry.*, 28 L.J. Ex. 3, is sometimes referred to as showing, that though the plaintiff may have established a *primâ facie* case, yet where the accident may have arisen from some unexplained cause, the plaintiff is called upon to give some further proof of negligence. But the finding of the jury in that case was peculiar, and in effect amounted to a verdict that the defendants had not been guilty of negligence. *Bird's case* does not show that where a *primâ facie* case is made and not rebutted, the plaintiff, to succeed in his action, must go beyond this. A train ran off the line, and a great deal of evidence was given on both sides as to negligence. This was left to the jury by the presiding judge; and their verdict was a

<sup>1</sup> *Simson v. L.G.O. Co.*, L.R. 8 C.P. 390.

special one, somewhat curiously expressed. They found "for the defendants, because there was not sufficient evidence as to the cause of the accident." This verdict was construed by the Court of Exchequer as being "substantially a finding for the defendants, on the ground that there was no negligence." That being so, the *primâ facie* case made by the plaintiff had been successfully rebutted, and the case established no new principle. It forms merely an illustration of the undoubted fact that, though you may have a *primâ facie* case of negligence, it may not be strong enough to meet the evidence produced by the defendant to show that he was not guilty of negligence. But in the course of the argument, the judge intimated an opinion, that where the accident is shown by the plaintiff's evidence to have been of a nature consistent with an absence of negligence, no *primâ facie* case of negligence is established, which is in accordance with *Phelp's case* (*ante*, p. 119); for no duty is shown to have been neglected.

## CHAPTER X.

### *Contributory negligence.*

What contributory negligence is. WHEN the plaintiff's own negligence is a factor directly contributing to the accident, so that without it the accident would not have occurred, then, although the defendant may also have been negligent, he is not liable. Such negligence on the plaintiff's part constitutes a good defence to his action, and is called contributory negligence.

But it has been pointed out (*ante*, p. 23) that even if the plaintiff be negligent, the defendant is still bound to exercise reasonable care in order to avoid an injury; and he is not excused from taking care, merely because the plaintiff has, by his own negligence, brought about an unusual or awkward condition of things.<sup>1</sup> If, therefore, I cross the street in a negligent manner, the driver of a coach is not exempt from liability if he could, by the exercise of ordinary care, have avoided causing me any injury.

Conversely, if the defendant is negligent, I am not entitled to get myself injured so as to saddle him with liability, if, by exercising reasonable care, I could have avoided an injury. "One person being in fault will not dispense with another's using ordinary care for himself," said Lord Ellenborough.<sup>2</sup>

Lord Justice Lindley, in *The Bernina* No. 2, 12 Prob. Div. at p. 89, formulated the law as follows: "A is

<sup>1</sup> *Davies v. Mann*, 12 L.J. Ex. 10.

<sup>2</sup> *Butterfield v. Forrester*, 11 East. 60.

injured by B by the fault more or less of both combined, then the following distinctions have to be made :—

- “(a) If, notwithstanding B’s negligence, A, with reasonable care, could have avoided the injury, he cannot sue B: *Butterfield v. Forrester* (*supra*); *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244; *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195.
- “(b) If, notwithstanding A’s negligence, B, with reasonable care, could have avoided injuring A, A can sue B: *Tuff v. Warman*, 27 L.J.C.P. 322; *Radley v. L. & N.W. Ry.*, 1 App. Cas. 754; *Davies v. Mann*, 10 M. & W. 546 (*supra*).
- “(c) If there has been as much want of reasonable care on A’s part as on B’s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A cannot sue B.”

The fact is, in this case it is not true for A to say he has been injured by B’s negligence; he can only say he has been injured by B’s negligence in addition to his own negligence, and that unless these two circumstances had combined, he would not have met with his injury. A cannot show that his injury is attributable to B’s negligence, and cannot therefore make good his case against B.

Lindley, L.J., goes on to express inability to understand why in such case the damage should not be apportioned; and he points out that no reason for it can be discovered. So looked at, there does not seem to be any reasonable explanation why a defendant, who also contributes to the accident by his negligence, should be exempt from liability. But his liability could only apply in so far as that contribution extends; and there remains the practical difficulty of determining the measure of that liability, and of assessing the extent of his act as a contributory cause to an accident which, presumably, would never have occurred at all without the concurrent

The defendant escapes all liability for his negligence when the plaintiff has been guilty of contributory negligence.

act of negligence on the plaintiff's part. The foundation of actionable negligence must, of course, be that damage has been sustained by the plaintiff. A man may be negligent with impunity, so long as his negligence is not the proximate cause of injury to another. It seems difficult to ascertain, on any practical basis, what accruing damage a plaintiff has sustained from a defendant's negligence, if no damage would have ensued had the plaintiff not himself been negligent.

The  
Admiralty  
rule.

No con-  
tribution  
between  
joint tort-  
feasors.

This difficulty is, however, roughly surmounted by the Admiralty rule, which gives half damages in the case of a collision of ships, where both vessels are equally at fault. But elsewhere than in the Admiralty Court the position remains as pointed out by the Lord Justice: "It is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong, and of throwing the whole liability on some one who was no more to blame than he." The hardship, his lordship thinks, proceeds from the rule that prohibits contribution among wrongdoers. This rule is, however, not pushed to the extent of depriving a man of his remedy who has sustained part of his injuries by an act of negligence of his own, provided that his negligence has not in any degree contributed to the immediate cause of the accident. Pollock, C.B., in delivering judgment in *Greenland v. Chaplin* (*ante*, p. 23), 19 L.J. Ex. 293, lays this down clearly, his opinion being expressed on consideration, and after having directed the jury in that case on a contrary view. "I entirely concur," he said, "that the man who is guilty of a wrong, who thereby produces mischief to another, has no right to say 'part of that mischief would not have arisen if you had not been yourself guilty of some negligence;' and I think that where the negligence did not in any degree contribute to the immediate cause of the accident, negligence ought not to be set up as an answer to the action; and certainly I am not aware that according to any

decision that has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or of the other of the party." (See also *Rigby v. Hewitt*, 19 L.J. Ex. 291.)

*Radley v. L. & N.W. Ry.*, 1 App. Cas. 754 (*ante*, p. 23), <sup>*Radley's case.*</sup> is a good illustration of the principle that though a plaintiff may be negligent, and his negligence may have contributed to the accident, yet the defendant is not excused from liability, if by the exercise of ordinary care he could have avoided the accident. The plaintiffs, colliery owners, had a siding on the defendants' railway line, over which was a bridge belonging to the plaintiffs, eight feet high from the ground. The defendants ran some trucks on this siding, which were loaded to a height of eleven feet; and the jury found that the plaintiffs had been negligent in allowing the trucks to remain there. The next day the defendants negligently pushed these trucks up against the bridge and broke it down. Notwithstanding the plaintiffs' contributory negligence, they were held entitled to recover. Ordinary care and diligence on the part of the defendants would have made the accident impossible.

But if the negligence which the plaintiff contributes towards the resulting accident is of such a nature that, without it, the defendant's negligence would not have injuriously operated, then the immediate cause of the accident is not brought about by the defendant's act, and he is not liable. "Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause."<sup>1</sup> <sup>Bowen, L.J.'s statement of the meaning of contributory negligence.</sup>

If the evidence given is equally consistent with the injury having been caused by the plaintiff's negligence as with the defendant's, the plaintiff's case fails; because he has not shown that the injury sustained is attributable to the defendant's negligence: *Wakelin v. L. & S.W. Ry.*,

<sup>1</sup> *Per Bowen, L.J., Thomas v. Quartermaine*, 18 Q.B.D. at p. 694.



12 App. Cas. 45 (*ante*, p. 104). And if the plaintiff's evidence establishes that the accident was due to joint negligence, his case must also fail; because the parties being *in pari delicto*, "potior est conditio defendentis," is the common-law rule.

The M.R., in *Davey v. L. & S.W. Ry.*, 12 Q.B.D. 70 (*ante*, p. 105), enunciates the same proposition by saying, "Even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that, if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

The exception to the rule that contributory negligence bars a plaintiff's claim, does not apply to a civil action.

There is, however, an exception to be noted to the rule that contributory negligence debars a man from effectively complaining of his injury; but it does not apply to a civil action. Where an injury has occurred owing to the neglect of the statutory duty to fence machinery imposed by the Factory and Workshop Act, 1878, s. 2, it has been held, that the fact that the injury was proximately caused by such contributory negligence by the injured person as would debar him from maintaining an action for negligence, does not prevent him from preferring a complaint under that section: *Blenkinsop v. Ogden* (1898), 1 Q.B. 783. The reason is, that the primary object of the section is, not to compensate the injured person, but to insist that machinery should be safe as well for negligent, as for careful people.

On whom is it to show the absence of contributory negligence?

A question arose, as might be anticipated, as to the onus of proof. What is it necessary for the plaintiff to show in order to establish his case? Is it for him to show, in the first instance, in addition to proving the defendant's negligence, that he himself had not been guilty of contributory negligence? Is he called upon, in order to

establish a case, and as a necessary ingredient of it, to prove this negative proposition?

Lord Halsbury, L.C., said, in *Wakelin's case* (*ante*, p. 104), that he was inclined to think that this was rather a question of subtlety of language, than a question of law; and Lord Fitzgerald, in the same case, thought that it would generally be found to be a contest of words only.

Lord Esher, M.R., when dealing with this case in the Appeal Court, and also in *Davey's case* and in other cases, laid it down that it is for the plaintiff to establish, first, that the defendants have been negligent; secondly, that the defendants' negligence caused the injury; and, thirdly, if not involved in the second proposition, that the plaintiff was bound, in presenting his case, to give affirmative evidence of the negative proposition that he had not negligently contributed to the accident. The judges in the House of Lords did not agree with this third proposition. It is true that the defendant's liability depends upon the fact that he has been guilty of a negligent act which contributes to the accident; and, secondly, that there has been no contributory negligence on the plaintiff's part; but this does not mean that the burden of proving the absence of contributory negligence is on the plaintiff. Lord Watson's opinion was, that the burden of proving affirmatively that there was contributory negligence rests, in the first instance on the defendants, and in the absence of any evidence going to show the existence of contributory negligence, the onus is not on the plaintiff to prove the negative; and he adopted the views in that respect which had been expressed by Lord Hatherley and Lord Penzance in *Dublin, Wicklow, etc., Ry. v. Slattery*, 3 App. Cas. 1169, 1180. But it is obvious that in the course of a case the onus may shift. It will generally be impossible for the plaintiff to lay his case before the jury without disclosing facts, which go either to show that there was contributory negligence on his part, or to rebut that conclusion. "If the plaintiff's

evidence were sufficient to show," said Lord Watson, "that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient *per se* to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion." He also quoted with acquiescence Lord Hatherley in *Dublin, Wicklow, etc., Ry. v. Slattery (supra)*, who said: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

Lord Fitzgerald, in his speech, while adopting the same view, took occasion to define contributory negligence, though he confined his definition to the kind of contributory negligence which the facts in *Wakelin's case* presented: "Contributory negligence in such a case as the present seems to me to consist of the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety, and which, had it been exercised, would have enabled him to avoid the injury of which he complains, or the doing of some act which he ought not to have done, and but for which the calamity would not have occurred."

Kay, L.J., in *Smith v. S.E. Ry.* (1896), 1 Q.B. at p. 189 (*post*, p. 331), said: "I wish to guard myself against being supposed to concur in the view [a view expressed by Lord Esher] that, in order to establish his cause of action, it is the plaintiff's duty to show that he was not guilty of contributory negligence. I am disposed to think that it is

not so ; a party is not ordinarily bound to prove a negative, and contributory negligence seems to be rather a defence to the action."

The authoritative view therefore is, that contributory negligence is a defence which must be raised and proved by the defendant, and which the plaintiff is not called upon in the first instance to negative. If, however, in the course of the plaintiff's case, evidence is given, either in chief or in cross-examination, or by the plaintiff's witnesses, which tends to show that the injury was brought about by the negligence which the plaintiff himself has contributed towards the result complained of, then the evidence of contributory negligence disclosed becomes so interwoven with the defence of contributory negligence set up, that the plaintiff is really proving the defendant's case. In such case, therefore, the onus has shifted ; and it is for the plaintiff to disprove the defence if he would succeed in his action. The evidence given by the plaintiff or his witnesses in laying the facts before the jury, has become so inextricably mixed up with the defence of contributory negligence on which the defendant relies, that unless the plaintiff can negative the impression that he has by his own negligence materially contributed to the accident, he loses his case.

If a case could be conceived where the defence of contributory negligence had not been pleaded, but yet the plaintiff's evidence disclosed the fact of contributory negligence on his part, it may be that Lord Esher's third proposition would hold good ; that the plaintiff would then be called upon to show, that he had not been guilty of contributory negligence, in order to succeed ; and being unable to present a set of facts which it is necessary for him to establish in order to make out his case, he must fail.

The facts in *Wakelin's case*, 12 App. Cas. 41 (*ante*, *Wakelin's case* p. 125), well illustrate the position, though the simple ground on which the House of Lords decided the case, was

that the alleged negligence of the defendants was not shown to have been connected with the accident complained of. The facts have already been stated on p. 104. The circumstances could only be left to conjecture; and it was as reasonable to suppose that the man met his death by running against the train, as by the train running against the man. There is no legal presumption, as Lord Halsbury, L.C., pointed out, that persons are careful in crossing a railway line, and look about before doing so; or, even if they see a train approaching, do not cross the line when it is dangerous to do so. If the deceased, however, had crossed, either without taking the precaution of looking around, or, having seen an approaching train, chose, nevertheless, to take the risk of crossing when the train was dangerously near him, the plaintiff's case would fail; because it would have been his negligence which brought about the accident, even if a negligent act were performed by the defendants. The facts of the case, therefore, as they could be laid before the jury by the plaintiff, raised a set of circumstances equally consistent with the deceased's negligence, as with the defendants'; and the plaintiff, therefore, was called upon to establish that the injury arose from the defendants' negligence. The onus was upon her to rebut the presumption raised by the evidence she had adduced, that this accident was due to her husband's contributory negligence. This, from the nature of the case as known to her, she was unable to do; and therefore her case failed. Even on the assumption that the defendants had been negligent in certain respects, the evidence did not go beyond this. "It affords," said Lord Watson, "ample material for conjecturing that the death may possibly have been occasioned by that negligence, but it supplies no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

It has been pointed out that where the evidence is equally consistent with the fact of the plaintiff's negligence having

been the cause of the injury, as with its having been brought about by the defendant's negligence, the plaintiff has not proved his case. The M.R. (Lord Esher), in the Court below, said: "But although the plaintiff had given in the first place *primâ facie* evidence of an absence of negligence on his part, if the defendant brought forward evidence which was contradictory of that, then you came again with the burden of proof upon the plaintiff, because if, upon the conflict of that evidence, part of which was given by the plaintiff and part by the defendant, the jury or the tribunal which had to try the fact is left in doubt whether the plaintiff was or was not negligent, contributing to the accident, the verdict and judgment must be for the defendant, because the burden of proof lies wholly on the plaintiff."

Upon that passage Lord Fitzgerald, in his speech in the House of Lords, makes a rather curious criticism. "If the noble and learned M.R. means," he said, "that if the evidence is such that the jury might reasonably come to a conclusion in favour of the plaintiff, or might reasonably draw a contrary inference, the case is to be withdrawn from the decision of the jury, and a verdict and judgment go for the defendant, I desire to say that I am not to be taken as acquiescing in that proposition." It is certainly difficult, if not entirely impossible, to gather from the passage quoted from the M.R.'s judgment that he meant anything of the kind. There seems to be nothing in the passage to bear the construction that the M.R. meant that a case must be withdrawn from the jury's consideration where the evidence is such that they may reasonably come to one decision or another. "I have always protested," said Lord Esher, in *Yarmouth v. France*, 19 Q.B.D. at p. 654, "that it is not for the judge to say whether or not a plaintiff (or the deceased in case of death) has been guilty of contributory negligence; he (the judge) has no right to hold that the evidence of it is conclusive; it should be left for the decision

Esher's  
statement  
criticized  
by Lord  
Fitzgerald.

of the jury." It may, however, be that Lord Fitzgerald had in his mind a passage to be found in a note on page 284 of Redfield on "Carriers," as follows: "It is said in a late English case (*Cotton v. Wood*, 8 C.B., N.S. 568) that it is equally the duty of one crossing a street or road to look out for vehicles coming along, as it is for the drivers of these vehicles to be vigilant in not running against persons crossing; and one suing for such an injury must give affirmative and preponderating evidence of neglect of duty on the part of the driver. And it is here declared to be established that where the evidence on each side, in cases of this kind, is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way. But, perhaps, where the evidence is conflicting, the judge is not the proper functionary to determine whether it is equally strong both ways. We should say he must submit it to the jury with instructions not to find a verdict upon an equal balance of evidence." It is perhaps this proposition that Lord Fitzgerald intended to emphasize as one which is in accord with the views now generally entertained.

## CHAPTER XI.

*Contributory negligence (continued)—Negligently placing persons in peril—When evidence should be left to the judge.*

IF the negligent act of one person places another in a position of peril, and, in his endeavour to escape the peril, he does something which causes him injury, he can maintain his action against the negligent person; and it makes no difference that he would have escaped injury if he had not taken that step. But the risk he elects to run must be justified by the peril in which he is placed.<sup>1</sup> The situation must be such as to make it dangerous for him to remain where he is, and dangerous for him to move away; and if in attempting to escape the one danger he falls into the other, the person who has negligently placed him in this position of alternative danger is liable. In such a case, although the efficient cause of the injury is the action the injured person himself takes, and therefore he contributes to the accident, he is not guilty of contributory negligence; because the original negligence has brought about a condition of things from which his action naturally or reasonably arises, and there is no negligence on his part at all.

But if the risk taken by the plaintiff is not a reasonable one to take, having regard to the position in which he is placed by the defendants' negligence; then, if he injures

*Jones v. Boyce.*

The risk taken must be reasonable

<sup>1</sup> *Jones v. Boyce*, 1 Stark. 493. See the facts of that case set out, ante, p. 40.



and justifiable under the circumstances.

*Adams's case.*

himself in accepting that risk, the defendants are not liable; because he has not taken such reasonable means of avoiding any injury to himself brought about by the defendants' negligence, as is expected from ordinarily prudent persons. He is guilty, therefore, of contributory negligence, and cannot recover damages. Thus, where the defendants' negligent act placed the plaintiff, not in any position of peril, but only in one of inconvenience, and in order to remedy the inconvenience he incurred a danger, which was not reasonably justified by the inconvenience occasioned him, he was held, in the case of *Adams v. L. & Y. Ry.*, L.R. 4 C.P. 739 (*ante*, p. 43), to have been guilty of contributory negligence, which precluded him from succeeding in his action for damages. This was an action against a railway company. The plaintiff, a passenger, was in a carriage, the door of which flew open several times through the defendants' negligence. There was room in the carriage for the plaintiff to have taken a seat away from the open door; and the train would have stopped in three minutes after the plaintiff had shut the door for the third time. When it opened again, and the plaintiff tried to shut it this time, he fell out of the carriage and was injured. Moreover, the train had stopped at three stations between the time when the door first opened and the happening of the accident. He was held not entitled to recover. The inconvenience did not reasonably justify the extent of the danger he ran in remedying it; and the injury did not flow from the negligence of the defendants. But it was pointed out by Montague Smith, J., that if the inconvenience had been very great, and the danger run in avoiding it only slight, it would not be unreasonable to incur the danger; and by Brett, J., that if the inconvenience had been such as to make it reasonable to get rid of it by an act performed with care, and not in itself obviously dangerous, the defendants, who negligently caused the inconvenience, would be liable for the

injury sustained in an attempt to avoid it. But the facts, and the question whether the plaintiff did or did not act reasonably, are for the jury to find, although in *Adams's case* the Court took upon itself to find that there was conclusive evidence of the plaintiff's want of care.<sup>1</sup> It was subsequently considered, as already stated (*ante*, p. 43), that the rule of law had been misapplied in this case.

It is not always easy to agree whether an injury has *Gee's case*. been caused solely by the negligence of a defendant, so that no question of contributory negligence arises; or whether evidence of effective contributory negligence is disclosed. This disagreement was shown in *Gee v. Metropolitan Ry.*, L.R. 8 Q.B. 161 (*ante*, p. 43). The plaintiff was a passenger on the Metropolitan Railway. During the journey he got up from his seat and put his hand on the bar across the window of his carriage, with an intention to look out to see the lights of the next station. This pressure caused the door to fly open, and the plaintiff fell out and was injured. The plaintiff was held entitled to succeed. There was evidence of negligence by the railway company, whose duty it is to see that the doors of a carriage are properly fastened, and this duty they had not discharged. Some of the judges of the Exchequer Chamber thought that there was no evidence of contributory negligence at all; and some that there was, and that the question of contributory negligence was properly left to the jury. But they all agreed that there was evidence of the defendants' negligence, and of that negligence having been the cause of the accident.

The question when evidence of negligence, or of contributory negligence, ought to be left to the jury, and when it ought to be withdrawn from their consideration, remained for a long time in an unsatisfactory position; and even when *Bridges v. L. & N.W. Ry.*, L.R. 7 H.L. 213,

<sup>1</sup> See *Bridges v. N.L. Ry.*, L.R. 7 H.L. 213, as explained by *Jackson v. Metropolitan Ry.*, 3 App. Cas. 193.

in discussing this question, laid it down that upon the facts of that case the matter ought not to have been withdrawn from the jury, as it had been at the trial, the decision was misunderstood by the Court of Appeal in *Jackson v. Metropolitan Ry.*, 2 C.P.D. 125; and had to be corrected when that case came before the House of Lords (3 App. Cas. 193).

In *Bridges' case* the plaintiff sustained injury in alighting from the carriage when the train had stopped and had drawn up at the platform, so that the two last carriages were left in a tunnel. The plaintiff was in the last carriage. The tunnel was dark, and full of steam, and a mass of hard rubbish was lying by the side of the rails opposite the last carriage. The question was also discussed whether calling out the name of a station forms an invitation to passengers to alight.<sup>1</sup> But it was held that the question of negligence on the defendants' part ought not to have been withheld from the jury, the evidence furnishing materials upon which it was necessary to take the jury's opinion. Much difference of opinion amongst the judges arose, and the case did not afford, as the Lord Chancellor (Cairns) hoped it would, a helpful guide to the Bench. In *Jackson's case* (*supra*) the carriage in which the plaintiff rode was full, and at one station three persons forced themselves in, and had to stand up. There was no evidence of any complaint having been made, or that the officials knew of this. At another station other persons, endeavouring to get in, opened the carriage door. The plaintiff stood up and tried to prevent any more persons from entering his carriage, when the train moved on. To avoid falling, the plaintiff put his hand on the edge of the door, when a porter came up, pushed away the people trying to get in, and slammed the door to, crushing the plaintiff's thumb. The judge at the trial ruled that there was evidence of negligence to be left to the jury. They

*Jackson's  
case.*

<sup>1</sup> See this question of "invitation to alight," considered Chap. xxii.

found a verdict for the plaintiff. On a rule being obtained to set this verdict aside, on the ground that there was no evidence of negligence, the rule was discharged; and on the case being taken to the Court of Appeal, the judges were equally divided, and the judgment of the Court below therefore stood affirmed. The House of Lords reversed this decision, holding that there was no evidence of any negligence connected with the accident—no evidence, that is, connecting the (possibly) negligent overcrowding, with the injury sustained by the plaintiff. The Lord Chancellor said it was impossible to lay down any rule except “that from any given state of facts, the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred; and the House repudiated the idea entertained by two of the judges of the Court of Appeal, that *Bridges’ case* had decided, that the question whether negligence could be inferred, is itself one for the jury to decide.

It was also decided by the House of Lords, in *The Slattery’s Dublin, Wicklow, etc., Ry. v. Slattery* (*ante*, p. 127), that <sup>case:</sup> where there is conflicting evidence on a question of fact, <sup>what</sup> whatever may be the opinion of the judge who tries the <sup>should</sup> case as to the value of the evidence, he must leave it for <sup>be left</sup> jury. <sup>to the</sup> the jury’s consideration. But even here, three of the noble lords dissented, and being of opinion that the facts did not disclose, in the first instance, uncontradicted evidence to establish the plaintiff’s claim, held that in such case the judge might direct a non-suit, or a verdict for the defendants. The question of fact, on which there was conflicting evidence, was whether a train on approaching a station had given warning of its approach by whistling. As to any evidence of contributory negligence, it was pointed out, that even if a train had passed through a station, and the driver had negligently omitted to whistle, yet if some one in broad daylight, and without having anything to obstruct his view of the rails, were to cross

in front of the advancing train and to be killed, this would be due to his own recklessness, and not to the negligence of the company. But in the case under discussion, the deceased had been knocked down by the train at night; there was another train standing in the station, which obstructed his view of the advancing train; and though, when he got on to the six-foot, he might have looked up or down the line, there was nothing to call his attention to the advancing train, if there had been no whistling. The question of contributory negligence ought therefore to be left to the jury. The Lord Chancellor (Cairns) intimated that if the question before them had been, whether a new trial should be granted on the ground that the verdict was against the weight of evidence—which they were precluded from considering—he would probably have thought that, even if there had been no whistling, the evidence did not show that the want of whistling was the occasion of the accident.

Their lordships who dissented, thought that whether there was or was not a whistle from the train, which carried the usual lights, it was negligence in a man to cross a railway line without looking to see whether a train was approaching; that the evidence given on the plaintiff's behalf showed that the deceased could not have looked about him; and that there was contributory negligence on his part clearly shown by the plaintiff's own witnesses. There was, therefore, nothing to leave to the jury, and a non-suit, or a verdict for the defendants, should have been entered. The point of difference, therefore, was a very slight one. On one hand it was said it might be reasonable for a jury to come to a conclusion that the man was not negligent, because (assuming there was no whistle) there was nothing to call his attention, while crossing the line, to an advancing train. On the other hand it was said that, whether there was a whistle or not, if a man chooses to cross a railway line without looking about him, any injury

he meets with is due to his own recklessness, and this would preclude him from maintaining an action, even if there had been negligence in omitting to whistle. Yet this discrepancy of opinion arose, although there was perfect agreement in the proposition that, where there is conflicting evidence, it is not the office of the judge to weigh that evidence. "But," said Lord Hatherley, one of the three noble lords who dissented, "*he may, and ought to, tell the jurymen, where there is no evidence at all on one side, that they will not be justified in law in finding contrary to the only evidence given, or in inferring that which no reasonable man would infer from the evidence.*" And he considered it would be an unreasonable inference to draw, that a man who crossed a line without looking about him exercised due care and caution. The Lord Chancellor, it would seem, felt inclined to agree with that; but on the question—apart from any consideration of the weight of evidence—whether the jury ought to have an opportunity of expressing an opinion upon conflicting facts, he and the majority of the House, were clearly of opinion that this opportunity ought always to be afforded them, whatever inference ought reasonably to be drawn from the facts. And it will be observed that the remarks of Lord Hatherley, just quoted, also imply that the question should be left to them, although the judge directs them what conclusion they ought to come to.

Although it may be thought to be a somewhat cumbersome method to leave the jury to draw inferences of fact, which may ultimately be set aside as being against the weight of evidence, or unreasonably drawn, yet to dispense with this appeal to the jury upon questions of fact, and the inferences of fact to be drawn from them, would be, in effect, to allow the functions of the judge to invade and oust the functions of the jury; and would be productive, as Lord Penzance said, of constitutional innovations which are alarming.

Questions of fact must be left to the jury, though only one reasonable answer is possible.

"I cannot understand," said Lord O'Hagan, "how the mere strength of proof, where there is an issue of fact to be decided, can transfer the right of decision to the judge. I do not acknowledge the force of the reasoning which would convert an issue of fact into an issue at law, merely because there seems to be a complete preponderance of evidence upon the one side, or because there is no evidence on the other." His lordship proceeded to point out that the judge, in such a case, should bring strongly before the jury what their duty is, and if they act perversely, the injured party has his remedy. And this is very much what Lord Hatherley said, with the difference that he thought it superfluous to allow the jury to give a verdict which could be set aside as perverse. "But I am not aware," Lord O'Hagan continued, "of any principle, and cannot discover any authority, which can transfer the jurisdiction and the duty of judgment, on matters of fact, formally submitted to a jury, merely because the case appears to the judge to be conclusively established on the one side or the other."

But the question whether there is any evidence for the jury, is one of law for the judge.

This ruling means that, where a question of fact is to be decided, and no question of law is involved, it is for the jury to decide it, however obvious it may be what the decision ought to be. But it does not mean that where, in the judge's opinion, there is no evidence at all of facts which would support the case put forward, the case should be left to the jury. For the question whether there is any evidence to support an issue raised, is one of law for the judge to decide.

Shutting a railway carriage door and trapping a passenger's fingers.

There is another case reported in the Exchequer Chamber<sup>1</sup> of a man getting his hand crushed in a railway carriage door, where contributory negligence on his part was not successfully established, and the case affords a simple illustration of this position. He was getting into

<sup>1</sup> *Fordham v. L.B. & S.C. Ry.*, L.R. 4 C.P. 619; and see also *Taylor v. M. & S.L. Ry.* (*ante*, p. 64).

a railway carriage at the station, and placed his left hand on the back of the open door to assist himself in mounting. The evidence whether there was a proper handle affixed for this purpose was conflicting. The night was dark, and the plaintiff saw none. In his right hand he held a parcel. Before he had succeeded in completely entering the carriage, the guard, without any warning, shut the door and crushed the plaintiff's hand between the back of the door and the doorpost. It was held that there was evidence of negligence on the part of the guard, and none of such contributory negligence on the plaintiff's part as would disentitle him to recover damages. Evidence of contributory negligence there was, in the opinion of the Court, but it was not such as made it necessary for the judge at the trial to withdraw the case from the jury; or for the jury to be unreasonable in finding that the plaintiff did not contribute to the accident by his own negligence. Probably in this case, where a guard, without any warning, shuts a door without looking to see whether a passenger was at the time actually engaged in entering the carriage, it might be said that though the passenger may have been getting in negligently, the guard's negligence in not observing the state of things made it almost impossible to attribute the injury to anything else but the guard's negligence. But where a man is sitting in a railway carriage, and, negligently having his fingers in the way, they are crushed by the door being slammed to after the train has started, the injury would in all probability be entirely due to his own carelessness. It is the common experience that railway carriage doors are closed in this way, and it would be impracticable to adopt any other course. An ordinarily prudent man must therefore keep his fingers out of the doorway if his conduct is not to be deemed negligent. In a somewhat similar case<sup>1</sup> a verdict for the plaintiff was set aside because the plaintiff, after having entered the carriage, kept his hand on the door

<sup>1</sup> *Richardson v. Metropolitan Ry.*, L.R. 3 C.P. 374, n.



for half a minute, and the porter, before closing the door, gave a warning. And, perhaps, nowadays the same result would be arrived at as regards a man who is already in a carriage, even if no warning had been given that the doors were about to be closed.

## CHAPTER XII.

### *Legal fictions—The doctrines of identification and of common employment.*

PERHAPS no more curious instance exists in the history of "Identification." judge-made law, than that presented by the doctrine of what was called "Identification." When two vehicles were in collision by the fault of both of them, the doctrine held that the passengers in either of the vehicles had no remedy against the proprietor of the other, because the passenger is so far "identified" with the driver who was guilty of contributory negligence, that the negligence of the driver was the passenger's own negligence sufficient to deter him from suing. This doctrine was seriously laid down in *Thorogood v. Bryan*, 8 C.B. 115, which was decided in 1849; and though the case was here and there adversely commented on, the same doctrine was reasserted so late as 1875 in the case of *Armstrong v. L. & Y. Ry.*, L.R. 10 Ex. 47; and was not finally and authoritatively discarded until forty years later than *Thorogood v. Bryan*, by the decision in *The Bernina No. 2*,<sup>1</sup> 12 P.D. 58; 13 App. Cas. 1, decided in 1888.

The reasons on which this extravagant doctrine was based were equally extravagant. It was said that any suggestion that the passenger had no control over the driver could not be entertained, because the passenger "selects" the conveyance himself, and having thought fit "to trust" the driver, must take the consequences arising

<sup>1</sup> See also *Mathews v. London Street Tram. Co.*, 58 L.J.Q.B. 12.

from any negligence exhibited by the person whom he has thought fit to trust. Such artificial reasoning as this is obviously untrue in fact. "Does a passenger by railway," asks Lord Esher, M.R., in the course of his elaborate judgment in *The Bernina* (2), "select or employ the engine-driver, or a passenger by ship select or employ the officer of the watch?" Even when deciding *Armstrong's case* (*supra*), Pollock, B., felt that the principle of "identification" was too extraordinary a one to be accepted; and he suggests an explanation of it, which is, to say the least, no whit less extraordinary: "If it is to be taken that by the word 'identified' is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition which could not entirely be sustained. But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." Why must he be so taken? What principle puts him in the driver's position so as to make him equally responsible with the driver for the driver's negligence? In truth, this explanation is only another way of stating the doctrine of *Thorogood v. Bryan* (*supra*), while discarding the reasons for it.

*Bernina.*

The decision in *The Bernina* (2) disposed of this theory once for all; and the learned and extremely elaborate judgments delivered deserve to be studied. They show, certainly, that when a web of artificial reasoning has once been spun by the judges, the effort to disentangle it, so that the light of truth and common-sense may once more be uncovered, is a prodigious one. A legal fiction once started is, like rumour, hard to overtake. It took forty years to dispose of the theory of "identification." It had previously been decided in *Quarman v. Burnett*, 6 M. & W. 499, that a passenger, by taking his seat in an omnibus, does not incur the same responsibility for the negligence of the

driver as if the latter had been his servant; which would be the position, if the theory of the passenger's identification with the negligent driver were complete. The authority of *Quarman v. Burnett* has never been doubted.

The only remnant of the doctrine of "identification" that now remains—and the name for it is probably an inaccurate one—is in the case of a child of tender age who is in the control of an adult, whose contributory negligence has brought about an injury to the child. In such case it is said, that as the person in charge has been guilty of negligence so that he could not maintain an action against a defendant who was also negligent, the child "is so far identified with him," that no action can be maintained by him.<sup>1</sup> With deference, it would seem not to be strictly accurate to say that the child is identified with the guardian's negligence. *Ex hypothesi* the child, in the arms of his nurse, is incapable of negligence in itself; it has no legal mind, and no duty to be prudent can be cast upon the child by the law. The position would rather seem to be, that the care and prudence of the person in charge, is substituted for that which the child is incapable of exhibiting; and there is no real reason why the fiction of "identification" need be here resorted to; nor does there seem to be any reason why the decision in *The Bernina* (2) can be said to shake the authority of *Waite's case*.<sup>2</sup>

Channel, B., once said: "The doctrine of contributory negligence in adults does not apply to an infant of tender age."<sup>3</sup> But this opinion was afterwards held to be erroneous.<sup>4</sup>

If the case be supposed of an infant of tender age running across a street in a way which, in an adult, would be

<sup>1</sup> See *Waite v. N.E. Ry.*, 28 L.J.Q.B. 258.

<sup>2</sup> See *per* Lord Herschell and Lord Watson in the House of Lords, 13 App. Cas. at pp. 10, 19.

<sup>3</sup> *Gardner v. Grace*, 1 F. & F. 359.

<sup>4</sup> *Abbott v. Macfie*, 33 L.J. Ex. 177.

negligent, and being run over by the negligence of an adult, as were, indeed, the facts of *Gardner v. Grace*,<sup>1</sup> then, on the assumption that the doctrine of contributory negligence does not apply to a child of tender age, what defence would remain open? If the accident could have been avoided notwithstanding the dangerous position in which the child had placed itself, then in any event—even if there had been any contributory negligence—the defendant would be liable. If the injury could not have been avoided, so that it was the result of an inevitable accident, the defendant would not be liable. The defence of unavoidable accident would then be the only available defence, if a child of tender age could not be guilty of contributory negligence. But *Abbott v. Macfie*<sup>2</sup> decides that he can.<sup>3</sup>

The doctrine of common employment.

Perhaps some of the artificiality of reasoning displayed in the doctrine enunciated by *Thorogood v. Bryan*, is to be found in the common-law doctrine of “common employment,” by which the risk of injury from a fellow-servant’s negligence is fictionally treated as one which a workman accepts as part of his contract of service, so that it is included in the circumstances which regulate his rate of wages. This doctrine was gradually extended by enlarging the definition of a fellow-servant. This common-law doctrine has been, with certain very large exceptions, embodied in the statute-law by the Employers’ Liability Act.

*Priestley v. Fowler* was the first case in which it was enunciated.

The case of *Priestley v. Fowler*, 3 M. & W. 1, which was decided in 1837, was the first which is said to have established the proposition, that a master is not liable to his servant for an injury occasioned by a fellow-servant during the course of employment; and as the principle of that case was subsequently extended, it is worth while to consider somewhat closely what it was that *Priestley v. Fowler* decided.

<sup>1</sup> 1 F. & F. 359.

<sup>2</sup> 33 L.J. Ex. 177.

<sup>3</sup> See the matter further discussed under “Liability to Trespassers” (Chap. xvii.).

A servant of the defendant's was injured when driving, with his master's goods, in a van which broke down. The van had been overloaded, and was driven by another servant; the plaintiff having, or having had the means of seeing for himself, that the van was dangerously overloaded. These were the material facts of *Priestley v. Fowler*, and Lord Abinger, in that case, held that the defendant was not liable. In the course of the argument he said: "The passenger pays his money in consideration of being carried, and there is an implied contract that he shall be carried safely, and he has no means of knowing how the coach is constructed or loaded. Here the servant is on the premises, *and has the means of knowledge*. It is not the case of a servant hired for that particular occasion, but of a general servant." And again he said: "The plaintiff was not bound to go by an overloaded van; *he consents to take the risk*. If it had appeared that the master *undertook* that the van was sufficient, it would be different." In the course of his judgment he declares "the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." He adds that a servant is not bound to enter a service where he apprehends danger to himself, and in most cases "he is just as likely to be acquainted with the probability and extent of it as his master."

All these observations are applicable to the common-law maxim, *volenti non fit injuria*; which would have disentitled the plaintiff to recover if he had knowingly and voluntarily taken the risk upon himself, even if the relationship between him and the defendant had not been that of master and servant.

Another remark which it appears to be just to make on this case is, that although it was admitted by the defendant's counsel at the bar, that the declaration disclosed that the van was overloaded by the defendant's direction, or

with his knowledge, Lord Abinger, in his judgment, read the declaration as though it contained no such allegation, and states his general proposition, that there is no implied duty on the master towards his servant to carry him safely, which would make him liable for damage "arising from any vice or imperfection *unknown to the master* in the carriage or in the mode of loading or conducting it." The question, therefore, of the legal effect of the master's breach of duty was not considered.

But then Lord Abinger came to deal with the position in which a servant stands to his master in respect of injuries sustained by him while in his master's service. The case was the first one of its kind decided by the Courts. "It is admitted," said the judge, "that there is no precedent for the present action by a servant against his master. We are, therefore, to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision one way or the other." Thereupon he proceeds to state many analogies, all of them alarming, and some of them false, as a "sufficient argument" against holding a master responsible for the negligence of a fellow-servant. Lord Esher, in giving evidence before the Select Committee on Employers' Liability, attributed the law as to the non-liability of masters for a fellow-servant's negligence, as decided in *Priestley v. Fowler*, to Lord Abinger's ingenuity in suggesting analogies; adding that Lord Abinger was a master in the invention of analogies, in which the advocate's talent mainly consists.

But Lord Abinger also put the matter on other grounds. "The mere relation of master and servant," he said, "can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself." It is difficult to see that that proposition can form the general ground on which to base the master's exemption from liability to his servant for injury arising from a fellow-servant's negligence.

The last reasons of all given by Lord Abinger are very remarkable. "In fact," he urges, "to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." Without considering the physical impossibility—certainly under the modern conditions of labour—of one servant looking about to see that no other servant is negligent in any way, these remarks of Lord Abinger could only apply to a case where the negligent act was one which was visible at the time, as where, in this case, the cart was overloaded. How the servant is to act so as to prevent his fellow-servants from being negligent in other cases which are not possibly within his cognizance, and where, therefore, he cannot be said to have voluntarily incurred the risk in the sense in which the maxim *volenti non fit injuria* has application, Lord Abinger does not point out. The applicability of what he is saying to anything else but the case of an overt act of negligence by a fellow-servant which is within the knowledge of the injured servant, Lord Abinger does not consider; but the doctrine was applied to all cases of injury by the negligence of a fellow-servant.

But the ground on which the doctrine of common employment was clearly put for the first time is stated in the case of *Hutchinson v. The York, Newcastle, etc., Ry. Co.*, 19 L.J. Ex. 296, which was decided in 1850 by Parke, B., Alderson, B., Rolfe, B., and Platt, B. There, the principle is declared to be, that a servant, on entering into the master's service, exposes himself to the risk of injury from his fellow-servants' negligence, "and he must be supposed to have

*Hutchinson's case.*



*contracted on the terms that, as between himself and his master, he would run that risk:*" Alderson, B., thus states it; and again as follows: "The principle is that a servant, when he engages to serve a master, undertakes as between himself and his master to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both." He adopts *Priestley v. Fowler*, and points with approval to "some of the inconveniences, not to say absurdities," which would result from a contrary decision, as stated by Lord Abinger. The argument of convenience, when used in ascertaining what the law is, must necessarily present dangers. It may tend to divert a purely scientific exposition; and it is apt to mingle the question of what the law is, which it is the function of the judge to ascertain, with the question of what the law ought to be, which is reserved for the Legislature to declare. What is spoken of as "judge-made law" imports this consideration, and, lacking "sanction," does not carry full authority.

Alderson, B., having approved of the principle of *Priestley v. Fowler*, proceeds to reason it out. "The principle," he says, "upon which a master is in general liable for accidents resulting from the negligence . . . of his servant is, that the act of his servant is, in truth, his own act." Therefore, he shows, that if a servant is driving his master's carriage, and does so negligently, "whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master." It is equally clear, he declared, that the servant, by whose negligence the accident has occurred, cannot treat his own negligent act as the act of the master, and cannot therefore defend a claim against himself by an injured third person. "Nor, if by his unskilfulness he is himself injured, can he claim damage from his own master upon an allegation that his own negligence was, in point of law, the negligence of

his master." By parity of reasoning, when a servant is injured by a fellow-servant's negligence, it would follow that the master is injuring himself. The servant, therefore, who, on this line of reasoning, is the master, can have no remedy against his master, who is the servant himself. This, if pushed to its logical conclusion, would seem to be the result. Such preciosity of reasoning springs from the artificial basis from which one starts; and perhaps it may be set aside, while the ground on which the doctrine is based must be accepted as authoritative. Up to this time the ground is stated as being an implied condition of the contract of service; that the servant undertakes the ordinary risks of the service, which includes the risk of his being injured by his fellow-servants' negligence. The inconvenience which would result if this were not so, is again insisted upon.

The case of *Wigmore v. Jay*, 19 L.J. Ex. 300, decided *Wigmore v. Jay* about the same time by Pollock, C.B., and the same judges (except Rolfe, B.) who decided *Hutchinson's case*, adopts the principle enunciated in that case. So far, it was limited to fellow-servants engaged at the time in a common employment; and, indeed, in *Hutchinson's case* Alderson, B., said: "It may, however, be proper, with reference to this point, to add that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of the master." The principle was, however, further extended, so as to apply to an accident which occurred to a servant in consequence of the negligence of another servant who was formerly, but at the time of the accident was no longer, in the master's employment; the injured servant never having been in the master's service at the same time as the negligent servant.<sup>1</sup> The Lord Chancellor

<sup>1</sup> See *Wilson v. Merry*, L.R. 1 S. & D. 326; see also *Allen v. New Gas Co.*, 1 Ex. D. 251.

(Lord Cairns), after saying that the master's duty is concluded by selecting competent workmen and efficient machinery, said that if persons so selected are guilty of negligence, that is not the master's negligence; "and if an accident occurs to a workman to-day in consequence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen."

This case was decided in 1868, and it was held a wrong direction by the judge below to tell the jury that if the workman, who had been negligent, had finished his work, before the deceased became a workman of the defendants, they were not fellow-workmen. But in *Johnson v. Lindsay & Co.* (1891), A.C. 371, it was said that Lord Cairns did not mean by the language he used in *Wilson v. Merry* to state the law differently from Lord Cranworth as expressed in *Bartonshill Coal Co. v. Reid*, 3 Macq. 266: "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." *Johnson's case* decided that the defence of common employment is not open unless the injured person, and the servant whose negligence caused the injury, were not only engaged in a common employment, but were in the service of a common master. In that case, builders contracted to build a block of houses under a specification prepared by the owner's architect, certain portions of the houses to be executed by the respondents. The respondents contracted with the architect to do their portion of the work, and had no contract with the builders, and were not under their direction or control. While the respondents were carrying out their

contract, workmen employed by them, negligently let a bucket fall on a workman (the appellant) who was working below them, who was in the employment of the builders. It was held that the relation of master and servant did not exist between the respondents and the appellant, and the action was maintainable. Though the two workmen were engaged upon a common work, they were not under common control.

It was again extended to the case of volunteers, where no contract of service exists, on the further assumption, <sup>The doctrine applied to volunteers.</sup> that if a man is allowed to assist in doing some work, even though he is not paid for it and no contract of service exists, it must be taken that he agreed to accept the risk of injury by the negligence of his fellow-workmen, just as much as if he were a fellow-servant paid for his services: *Degg v. Midland Ry. Co.*, 26 L.J. Ex. 171; approved in Exchequer Chamber in *Potter v. Faulkner*, 1 B. & S. 800. This is a very remarkable extension of an assumption upon another assumption. It is assumed, firstly, that a servant has agreed as part of his contract of service to hold the master exempt from liability to him for injury occasioned by his fellow-servants' negligence; and secondly, it is assumed that though there is no contract of service at all, the volunteer must be taken to have agreed to volunteer upon the terms of such a contract. This case was also argued for the plaintiff on the ground that her husband, who was killed, was a trespasser; and that, on the principle of two cases which were cited,<sup>1</sup> a trespasser may maintain an action for negligence. It was urged that the deceased ought not to be in a worse position than a trespasser. This curious argument was both urged at the bar, and also elaborately dealt with in the judgment, although the facts of the case would seem to show, that whatever else the deceased might have been, it was exceedingly difficult to

<sup>1</sup> See "Liability to Trespassers" (Chap. xvii.).

regard him as a trespasser. Three of the defendants' servants were endeavouring to turn a truck on a turntable in a siding, carrying out this work presumably by the order of their masters, and were unable to accomplish it. Seeing this, the plaintiff offered to assist them, and his help was accepted. It is not easy to understand how, under these circumstances, he could be in the position of a trespasser. While he was so engaged, some other servants of the defendants negligently sent some trucks into the siding, which knocked him down and killed him. It was also pointed out that if the deceased had been a servant of the defendants, he could not have maintained an action for an injury to him caused by his fellow-servants' negligence; and thence, it was said, he ought not to be in a better position than if he had been a fellow-servant. We look with interest to see why; and we find only this explanation: "it seems impossible to suppose that the deceased, by volunteering his services, could have any greater rights, or impose any greater duties on the defendants than would have existed if he had been a hired servant." This, however, is only reaffirming the proposition that a volunteer must be assumed to be a fellow-servant who has entered into the same contract as the other servants. It does not show why a man who volunteers assistance to servants in order that they may carry out the particular piece of work their master has ordered them to do, and whose assistance has been accepted by the servants to enable them to perform it, should be in the position of one who has agreed to be bound by the terms, expressed and implied, of a contract entered into with their master by the persons he assists. The result of *Degg v. Midland Ry.* would seem to be, that if I run to assist a servant, driving his master's coach, whose horse has fallen in the street, and while so assisting him, another servant of the same master negligently runs into me and injures me, I have no remedy against the master for that servant's negligence: because I cannot by

my voluntary benevolence impose upon him a greater liability than would have been his if I had been a fellow-servant.

*Degg v. Midland Ry.*, however, cannot be said to be of general application.

## CHAPTER XIII.

*Common employment (continued)—“ Fellow-servants ”—  
“ Common-control ”—Liability for acts of a servant  
whose services are lent.*

*Wright's  
case dis-  
tinguishes  
Degg v.  
Midland  
Ry.*

It would appear that the real principle of *Degg v. Midland Ry.* (*ante*, p. 155) is, that one cannot by volunteering one's services impose any greater liability on the master than that which he is under to his servants engaged on such service; unless the circumstances lead to the conclusion that the servants had the authority of the master to make use of the assistance. This appears from the decision in *Wright v. L. & N.W. Ry.*, L.R. 10 Q.B. 298; 1 Q.B.D. 252; following *Holmes v. N.E. Ry.*, L.R. 4 Ex. 254; 6 Ex. 123; which shows that the legal position of a volunteer is not always that which is explained in *Degg v. Midland Ry.* The volunteer in *Wright's case* was doing for himself when he met with his injury, and by the defendants' permission, an act which the defendants were bound to do for him. The principle of *Holmes's case* was, that where a person is not a mere licensee, but is engaged, with the defendants' consent, in a transaction of common interest to both parties, he is entitled to require that the defendants' premises should be in a reasonably safe condition. The facts in *Wright's case* allowed that principle to be applied, and distinguished it from *Degg v. Midland Ry.* The plaintiff sent a heifer (which was put in a horse-box) by defendants' railway to Penrith. On arrival there, only one porter being available to shunt the horse-box to the only place

from which the heifer could be delivered to the plaintiff, he was allowed to assist in the shunting, and was injured whilst doing so by a train of the defendants negligently driven. It was held that he was not a mere volunteer assisting the defendants' servants (as in *Degg v. Midland Ry.*), but was on the defendants' premises with their consent for the purpose of assisting, and they were liable to him for the negligence of their servants according to the principle of *Holmes's case*. There was evidence that the station-master assented to what the plaintiff was doing, and this was held to be the assent of the defendants; because the station-master was the defendants' agent to deliver the heifer, and was, therefore, the person to assent, on the defendants' behalf, to the plaintiff's act. The distinction, therefore, seems to be that it was part of the defendants' duty to deliver the heifer by the hand of the station-master, and in the course of discharging such duty, if the station-master allowed the plaintiff to assist, he had authority to do so, as the defendants and the plaintiff were engaged on a matter of common interest to both parties. In *Degg v. Midland Ry.*, on the other hand, the defendants and the plaintiff had no "common interest" in this sense, and that being so, their servants had no authority to assent to receive the plaintiff's assistance.

These extensions of the doctrine of *Priestley v. Fowler*, and of *Hutchinson's case*, proceed in the course of determining the meaning of "fellow-servant" or "fellow-workmen;" and it is curious to note that as the conditions under which labour is performed are enlarged, and its ramifications extend, so is the principle stretched to include these new conditions.

The next case after *Hutchinson's case* (*ante*, p. 149) and *Wigmore v. Jay* (*ante*, p. 151), was *Seymour v. Maddox*,<sup>†</sup> 20 L.J.Q.B. 327, decided in the following year, 1851. This case is sometimes referred to as affirming *Priestley v. Fowler*; but does not, when examined, seem to



deal with it; and, indeed, no reference to its principle is made in the four judgments delivered. A person engaged to perform at a theatre fell down a large hole in the floor of the theatre after the performance, while passing along the floor, as the performers were accustomed to do. It was alleged that the accident was due to this hole being insufficiently lighted and guarded; and that the defendant's duty towards the plaintiff was to have the hole properly lighted and fenced. It was held, that there was no such duty upon the defendant; the ground stated being, that if a servant finds a certain *state of things* on the premises, and chooses to enter into service there, he must take the consequences of anything that may occur owing to such state of things. "The master," said Erle, J., "did not contract to have the premises in any different state from that in which they were in the ordinary course of business." Here, there would be no negligence on the defendant's part, no want of care towards those who were in his employ, and no omission on the part of his servants towards others of his servants, though he would be liable to a stranger who had been invited on to the premises. This case is very much like *Indermaur v. Dames*, L.R. 1 C.P. 274; 2 C.P. 311, where the plaintiff, a stranger, who came in the course of business on to the defendant's, a sugar-refiner's premises, fell through a hole, and succeeded in establishing his claim. But it was pointed out, that no such claim could be supported against the defendant if made by one of his servants, as they were aware of the condition of the premises. *Seymour v. Maddox*, therefore, is not so much an illustration of the doctrine of common employment, but rather of the application of the maxim *volenti non fit injuria*; the danger being visible, and voluntarily incurred.

*Skip v.  
Eastern  
Counties  
Ry.*

The case of *Skip v. Eastern Counties Ry.*, 23 L.J. Ex. 23, decided in the same year (1851), is very scantily reported as far as the judgments are concerned. A guard

in the employ of the defendants had to attach carriages to an engine and to send them off at a certain time. In consequence of the plaintiff not having another person to assist him, the engine started, threw him on the rails, and injured his arm. For three months previously, the plaintiff had performed the same work unassisted, and without raising any objection. It was held that the plaintiff had voluntarily undertaken this duty; if it was more than he could perform, he should not have undertaken it; and he could not sustain his action. This case, if it deals with the doctrine of common employment, was also decided on the maxim *volenti fit non injuria*,<sup>1</sup> by which the plaintiff was disentitled to recover damages, even if the relationship between the defendants and him had not been that of master and servant. It was altogether unnecessary to rely on the doctrine of common employment to arrive at the same result. Lord Brougham's definition of fellow-workmen was,<sup>2</sup> that "they must be in the same common employment, and engaged in the same common work under that employment." "Fellow-workmen."

Now the gradual extension of the doctrine occurs on the interpretation of the question, what is a fellow-servant?

In *Wiggett v. Fox*, 25 L.J. Ex. 188, decided in 1856, before Pollock, C.B., Alderson, Platt, and Martin, BB., the defendants were contractors. They employed one Moss to do part of the work by the piece, for a sum payable monthly according to the work done, the defendants finding the necessary tools. The plaintiff, who was then in the defendants' employ, was taken by Moss from his work in order to assist in the piece-work at weekly wages. In accordance with the general regulations at the defendants' works, the plaintiff's wages were paid weekly by the defendants with their other workmen; and Moss, who *Wiggett v. Fox*: contractor and sub-contractor.

<sup>1</sup> See Chap. xiv., where this maxim is discussed.

<sup>2</sup> *Bartonshill Coal Co. v. McGuire*, 3 Macq. at p. 313, decided in 1858.

previous to the contract piece-work, had also been employed by the defendants at weekly wages, drew from the defendants money in that character, the whole being charged against him, and deducted from the instalments payable to him. The plaintiff was killed while at work on the piece-work by the negligence of the defendants' servants. It was held that both the plaintiff and Moss were servants of the defendants, and therefore no action would lie against the defendants in respect of injury occasioned by the negligence of the defendants' other servants. Here the defendants were the general contractors, and Moss was the sub-contractor, and the jury found on the facts, that the deceased was not the servant of the defendants, but the servant of Moss; and the Court held that the facts did not enable the jury to arrive at that conclusion. Martin, B., thought that Moss was not strictly a sub-contractor, as the relation of master and servant existed between him and the defendants; and that an action by a stranger in respect of the negligence of the plaintiff, would have been properly brought against the defendants, and not against Moss. If, from the particular mode of employment in this case, Moss was not a sub-contractor, no significance attaches to this case beyond affirming *Hutchinson's case*, 19 L.J. Ex. 296 (*ante*, p. 149). But if Moss was a sub-contractor, and the plaintiff was his servant, and he was injured by the negligence, not of Moss's servants, but of the general contractors' servants, it assumes the importance of extending the principle of common employment to the case of contractors and sub-contractors. The judgment seems to accept this proposition. "Here both servants were at the time of the injury engaged in doing the common work of the whole contract, and for the contractors, the defendants; and we think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing the work, each

directing and limiting his attention to the particular work necessary for the completion of the whole." And the judges considered that in so holding they were giving effect to the decision in *Priestley v. Fowler* (*ante*, p. 146), in which, it will be remembered, no question of contractor and sub-contractor arose.

But in the course of the argument Martin, B., said: "The test is, whether the defendants could interfere in the work done by Wiggett (the plaintiff). Now it is clear from the regulations (the printed piece-work regulations) that they could. I observe that is the test applied by Crompton, J., in *Sadler v. Henlock*, 24 L.J.Q.B. 138. He says: "The real test is, whether the employer has any control over the persons employed; and whether the payment is by the day or the piece can make no difference. The defendant in this case could, during the progress of the work, overlook and direct what was to be done, and the manner of doing it; and it would be rather against common sense to say that a man employed in that way is a contractor." It is, however, curious that when the considered judgment in *Wiggett v. Fox* came to be delivered, no limitation of the passage quoted from it (*ante*, p. 160) was made or suggested. If *Wiggett v. Fox* was intended to establish that the servants of contractors and sub-contractors are engaged in a common service, and are therefore fellow-servants, it is only necessary to look back upon *Priestley v. Fowler* (*ante*, p. 146) and *Hutchinson's case* (*ante*, p. 149) to see that the principle of those cases has been enormously extended; and that it was not necessary so to hold in order to give effect to *Priestley v. Fowler*. The legal assumption in that case and in *Hutchinson's case* was, that the workman on entering upon his employment takes the risk of being injured by the negligence of others in the same employment; but if it be said that the servant of a sub-contractor is a fellow-servant of the general contractor, because the work of both tends to

The test  
of "con-  
trol."

the completion of the whole piece of work, it is putting on a workman the further implied term that he is willing to take the risk, not only of the carelessness of the servants of his immediate employer, but also of the servants of the general contractor, and of any other sub-contractors however numerous, who are in any way working towards the object of completing the whole contract.<sup>1</sup>

*Wiggett v. Fox*  
criticized  
by Cock-  
burn, C.J.

But there appears to have been some misapprehension by the judges, of the facts in *Wiggett v. Fox* as deduced from the printed regulations. Martin, B., in the course of the case of *Abraham v. Reynolds*, 5 H. & N. 143, said that he assented to the judgment in *Wiggett v. Fox* upon the ground that the position of the parties was ascertained by the test stated by Crompton, J., in *Sadler v. Hencock* (*supra*), viz. whether the defendants retained the power of controlling the work. In the same case Channell, B., so described the facts of *Wiggett v. Fox* as understood by him : "The defendants, having contracted for the erection of the Crystal Palace, entered into agreements with five other persons for the execution of portions of the work, and the sub-contractors engaged the services of Wiggett. But it was proved that the deceased was paid by the defendants, and it further appeared by the printed rules which were given in evidence, and by the evidence of Moss, one of the sub-contractors, that the defendants had a control over and power to dismiss Wiggett, though engaged by the sub-contractor." That the evidence referred to did prove this is, however, doubtful. Cockburn, C.J., in *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205, declared that he could not come to the conclusion that the facts were what Channell, B., thought they were, in the explanation of them as given by that learned judge in *Abraham v. Reynolds* ; and intimates that the decision might be supported if those were the facts ;

<sup>1</sup> The Scotch case of *Woodhead v. Gartness Mineral Co.*, 4 Ct. Sess. 469, does take that view, but no English case goes so far. See *Johnson v. Lindsay* (*ante*, p. 152), where *Woodhead's case* is commented on.

but that his view was, that the case was not rightly decided. Even if the facts were as explained by Channell, B., the decision in *Wiggett v. Fox* is an extension of the principle of *Priestley v. Fowler*. *Murray v. Currie*, L.R. 6 C.P. 24, *Murray v. Currie*. seems to further extend it. The defendant was the owner of the steamship *Sutherland*, and he had in his employ a man named Davis. When the vessel was alongside the quay, the cargo had to be unloaded, and the defendant employed a stevedore to unload her. The vessel was provided with a winch, worked by an engine, to facilitate the unloading. The stevedore supplied the labour, and did the work under an independent contract with the owner of the vessel; and was not therefore his servant. He could, if he pleased, use the services of any of the ship's crew. In exercising this option he took on Davis to work the winch. The defendant continued to pay Davis, but the defendant deducted the wages so paid from the amount due to the stevedore under the contract. The stevedore gave evidence that the unloading was under his control, and that while the shipowner selected such of the crew as were employed in the job, he, the stevedore, selected the work for them, and had control over it. The plaintiff was a dock-labourer engaged by the stevedore; and, while he was on the work of unloading, he was injured by the negligent management of the winch by Davis. The question was, whose servant was Davis? If he was the stevedore's servant, then the plaintiff was a fellow-servant, and could not recover against the stevedore; if Davis was the defendant's servant, then the plaintiff, who was the stevedore's servant, could recover against the defendant. The verdict was given for the plaintiff, and was set aside by the Court, who held that Davis and the plaintiffs were fellow-servants of the stevedore. Willes, J., said that the rule exempting an employer from liability to his servant arising out of the negligence of a fellow-servant, is subordinate to another rule, and does not operate until a preliminary condition is

Willes, J.'s  
test as to  
what is a  
fellow-  
servant.

fulfilled: "It must be shown that if the injury had been done to a stranger, he would have had a remedy against the person who employed the wrong-doer." The defendant, he continued, would not have been liable to the charterer if Davis's negligence had damaged the cargo, and, he said, "for this simple reason, that the person doing the work in the performance of which the damage was done, was not doing it as his servant. He was acting altogether independent of his control." This means, on these facts, that though Davis continued to be the general servant of the shipowner, and to be paid his wages by him, yet because he was ordered by his master to do work which was under the control of the stevedore, he was the stevedore's servant. In other words, Davis changed masters without being cognizant of it, because his wages were (presumably without his knowledge) ultimately deducted by the shipowner from the amount due to the stevedore; and the working of the winch for the unloading, which the shipowner (at that time certainly Davis's master) selected him to do, was, as part of the general work of unloading, under the control of the stevedore. The reasoning that Davis was not doing the work as the shipowner's servant, notwithstanding that he was selected by him to do it, although the stevedore might, if he pleased, have rejected his services, does undoubtedly stretch the definition of a fellow-servant, so as to make the doctrine of common employment apply.

A servant lent to some one else is the servant of that person while the purpose for which he is lent continues.

*Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205 (*ante*, p. 162), may be considered with this case, as a similar one. The defendants began sinking a shaft in their colliery, and for this purpose had fixed an engine near the mouth of the shaft. They then agreed with one Whittle to carry on the work for them, he to find all the labour, and the defendants to provide the necessary appliances, and an engineer to work the engine, both engine and engineer to be under Whittle's control. The plaintiff, one of Whittle's workmen, was injured, while engaged on the work, by the negligence

of the engineer. Here, again, it was held by the Court of Appeal, affirming the judgment of the Common Pleas Division, that though the engineer remained the general servant of the defendants, he, being under the control of Whittle when the accident happened, was Whittle's servant, and not the defendants'. "If the agreement had been," said Cockburn, C.J., "that whereas Whittle was to sink the shaft and get away the soil, and do all the necessary work to make a proper shaft, yet that incidentally to this work the defendants had undertaken to do part of it themselves by means of their machinery and servants—so that this part of the work would have been carried on independently of Whittle and not under his control—then the defendants would have been liable." It was again the question under whose control the engineer was; and the learned judge arrived at the conclusion that the engineer "was practically in Whittle's service." To be "practically" in some one's service, when you are engaged and paid by another, is perhaps a conclusion to arrive at, which cannot be more definitely described. But the question to be decided is, who is the employer? and it has to be decided on the basis, that by "the employer" is meant the person who has the right to control the servant in performing the particular act. Cockburn, C.J., also states the rule of law to be (*Rourke v. White Moss Co.*, ante, p. 162): "When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." That this is the rule of law has been held over and over again; its application, however, works a hardship on the servant, in conjunction with the implied contract that he undertakes to run the risk of injury by a fellow-servant's negligence; because the original employer is only giving his servant lawful orders, which the servant could not refuse to obey, when he tells him to



Whether the servant is lent gratuitously or not, the rule is the same.

do the particular work for which he is lent. The effect, therefore, is to make the implied term apply to a new set of fellow-servants, about whom, it may be, the servant knows nothing; and to this extent disposes of the idea that a servant elects, when entering into service, whether to enter the service or not, by taking into consideration the particular fellow-servants with whom he has to work; or, as it is sometimes put, "selects" his employment. In *Jones v. Corporation of Liverpool*, 14 Q.B.D. 890, this point as regards the servant who is lent to another, was called in aid on behalf of the plaintiff without success, and Grove, J., thought the rule did not apply where the servant was lent gratuitously; but in *Donovan v. Laing, etc., Syndicate* (1893), 1 Q.B. 629, all the judges declared that it made no difference whether the servant was lent gratuitously, or for reward.

But where the servant is lent, the lender retaining complete control over him, he remains the lender's servant.

That the question of control is the test of fellow-service, some of the cases show disagreement.

In *Jones v. Corporation of Liverpool* (*supra*), the defendants to whom the servant (a driver of a watering-cart) was lent, exercised no control over him, otherwise than that their inspector directed him what streets to water. This fact distinguishes the case from *Rourke's case* (*ante*, p. 164), and it was held that the driver was not the defendants' servant, the lender retaining complete control over him.<sup>1</sup>

There are, however, other cases which are difficult to reconcile with those that lay down that the question of common service is to be determined by common control. One of these is *Warburton v. G.W. Ry.*, L.R. 2 Ex. 30. The plaintiff was a porter employed by the North-Western Railway at their Manchester station. The defendants used this station also, and their servants, while within the station, were subject to the rules of the North-Western Railway, and under the control of the North-Western station-master. The plaintiff, while engaged in his usual employment in the station, was injured by the negligence of the defendants'

<sup>1</sup> And see *Goslin v. Agricultural Hall Co.*, 1 C.P.D. 482.

engine-driver. If the cases previously cited are to be applied, the injured servant and the one who caused the injury, being under one common control, were fellow-servants of the North-Western Company, and the engine-driver being therefore the servant of that company, could not make the Great Western Company liable for his negligent acts. It was, however, held that the plaintiff and the engine-driver were not fellow-servants, and that the former could maintain his action against the Great Western Company. Kelly, C.B., after stating the law as to common employment, and the ground upon which it proceeds, viz. that the servant takes the risk of being injured by a fellow-servant's negligence, said: "But we are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable." Certainly, this decision appears to be inconsistent with *Wiggett v. Fox* (*ante*, p. 159).

So, too, *Swainson v. N.E. Ry.*, L.R. 3 Ex. D. 341, where the Court of Appeal overruled the decision of the Exchequer Division upon facts somewhat similar to those in *Warburton's case*, and the defendants were held liable. Bramwell, L.J., in the course of his judgment, gave another definition of the ground on which the doctrine of common employment is based. "It is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant." He added that the two forms of proposition were substantially the same, having previously laid it down that while a master is liable to a stranger for injury inflicted by a servant's negligence, this is not the rule where a servant is injured by a fellow-servant's neglect.

*Abraham  
v. Reyn-  
olds.*

*Abraham v. Reynolds*, 5 H. & N. 143 (*ante*, p. 162), may also be considered with the two previous cases. The plaintiff was a servant of J. & Co., who were employed by the defendants to carry cotton from a warehouse of the defendants. While receiving the cotton into his lorry, a bale fell on the plaintiff in consequence of the negligence of the defendants' porter in lowering it from the upper floor. It was held, that, as the plaintiff and the defendants' servants were not under the same control, and did not form part of the same establishment, they were not engaged on a common employment, so as to deprive the plaintiff of a right of action against the defendants for their servant's negligence.

Pollock, C.B., made this observation: "Here it is said that there was common work. If it was agreed that this work should be done by all, the rule might apply; *but it does not apply merely because the parties had a common object*, if they had separate ends, and for some purpose antagonistic interests." And Watson, B., observed, that they might be persons doing work for a common object, but not under the same control, or by the same orders. It was held by the House of Lords in *Johnson v. Lindsey* (1891), A.C. 371 (*ante*, p. 152), that the defence of common employment is not applicable, unless the injured person, and the servant whose negligence caused the injury, were not only engaged in a common employment, but were also in the service of a common master.

The question whether a servant is under some one's control so as to make him a servant of that person, and the master therefore liable for the servant's negligence, is really a question of fact. The point, however, according to the preponderance of judicial opinion, must be decided on the lines that, where the "control" is, there the relationship of the master exists.

As we have seen, a man may be a general servant of one master at the same time as he is acting under the

control of another; and where he is under such control, the fact of his being the general servant of some one else will not make him any the less the servant of the person controlling him in the performance of a particular act or duty. This is shown by *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205 (*ante*, p. 164), and by *Donovan v. Laing, etc., Syndicate* (1893), 1 Q.B. 629. (See also *Preston Corporation v. Biornstad* (1898), A.C. 513.)

In *Waldock v. Winfield* (1901), 2 K.B. 596, decided in the Court of Appeal, the question of control was again presented for consideration. A company of ironfounders entered into a written contract with the defendant for the hire of van, horse, and driver for the purpose of delivering goods to their customers. The driver of the van, acting negligently when delivering a girder to a customer of the company, injured the customer's servant. There was no evidence that any one on the company's behalf exercised any control over the driver as regards the delivery of goods for the company; and upon the construction of the written contract, as read by the Court, the control of the driver remained in the defendant. The defendant was therefore held liable for the driver's negligence, on the ground that the driver was his servant. The meaning of the agreement being held to be, that the driver was not the servant of the company or under their control, but was to remain the servant of the defendant; these facts distinguished the case from the cases of lending a servant, as dealt with in *Rourke v. Moss* (*ante*, p. 164), and *Donovan v. Laing Syndicate*<sup>1</sup> (*supra*).

<sup>1</sup> See also *Fitzpatrick v. Evans* (1902), 1 K.B. 505, which was a case decided under the Employers' Liability Act; and *The Union SS. Co. v. Claridge*, 1894, A.C. 185.

## CHAPTER XIV.

*Fellow-servants (continued)—Dissimilar services—"Common object"—Master joining in the work.*

**Dissimilar services.** ANOTHER consideration of the term "common employment" shows, by the decisions, that the term applies to quite dissimilar services, where the employment necessarily brings the person accepting the contract of service within certain risks, which are a "natural and necessary" consequence of the employment.

Thus, where a carpenter is employed by a railway company to do carpenter's work for the general purposes of the company, an employment which necessarily brings him into contact with the traffic of the railway, he takes upon himself, in accepting that employment, the risk of the carelessness of those who manage the traffic.<sup>1</sup>

This would seem to follow from the original proposition that the workman impliedly contracts to run the ordinary risks of the service; though it may be that the earlier cases did not contemplate this development.

In order to determine whether a man is a fellow-servant, the judges in *Morgan's case*<sup>1</sup> said that the common object must be looked at, and that it would be over-refining to look at the common *immediate* object.

The previous decision in *Tunney v. Midland Ry.*, L.R. 1 C.P. 291, was a simpler case. The plaintiff, a servant of the defendant railway company, was injured while

<sup>1</sup> *Morgan v. Vale of Neath Ry.*, L.R. 1 Q.B. 149; see also *Barton-hill Coal Co. v. Reid*, 3 Macq. 266 (*ante*, p. 152).

returning from his work to Birmingham (where he resided) in a railway train belonging to the defendants, and in consequence of the negligence of their servants. It was, however, part of the express terms of his engagement that he was to be carried by the train to and from his work. It was held that he was a fellow-servant of the person who had been negligent, as under the circumstances applying to the terms of his engagement, he was, at the time of the injury, acting in the service of his master.

*Lovell v. Howell*, 1 C.P.D. 161, is not so simple a case as this, or indeed as *Morgan's case*. The plaintiff was a lighterman, and he was employed at weekly wages by the defendant, a corn-merchant, his duty being to attend at the waterside of the premises every tide for a short period before and after high-water, in order to bring barges from the wharf and moor them. He had nothing to do with the loading or unloading of the barges, or with assisting in any way at the defendant's warehouse. It was his habit to go to the office on the land side of the warehouse to get his orders, or if the defendant's manager sent for him. He usually went there by stepping from the barges into and through the warehouse, and out by a door to the street. He happened one day to be on the barges, at a time when his actual duties did not require him to be there, and he was sent for to the office. He proceeded there in his usual way; and as he was passing out from the warehouse door to the street, he was injured by a sack of grain, which another of the defendant's servants negligently hoisted, by means of a crane, from a waggon. The injury was held to have been inflicted by a fellow-workman, and the defendant was consequently not liable. "The question is," said Archibald, J., "whether the injury to the plaintiff in this case did not in some sense arise from one of those risks of the service he was engaged in, which must, or ought to, have been in his contemplation when he entered into it." The evidence led the Court to the

*Lovell v. Howell* considered.

conclusion that it was part of the plaintiff's duty to go to the office for orders, and that to do so, he would pass through the warehouse out into the street in the way in which he had on this occasion passed. It was said that while doing this, he would necessarily have to run the risk of the negligence of other servants of the defendant; and that was a contemplated risk of the service. Here, as in *Morgan's case*, the services of the injured servant and of the negligent one were quite dissimilar; but the case would seem to go further than *Morgan's case*. There, the very work on which the plaintiff was employed had to be performed amidst the dangers of the railway traffic. But here, the plaintiff's actual employment brought him in no way in contact with the warehouse, except in so far as it could be said, that he had to go to the warehouse to get the orders which would enable him to perform his work. It is to be observed, further, that at the time of the accident he was not actually engaged upon his employment when the manager sent for him; so that if he had not then been available, it would seem that the defendant could not have complained of his absence as a neglect of duty. He would not, therefore, at that time, seem to have been doing work which he was bound to do under his contract of service.<sup>1</sup> Lindley, J., said he entertained a doubt at the trial, whether at the time of the accident the plaintiff was in the employ of the defendant. "His duty did not call him to the premises at that time. But he was in the habit of going occasionally to see what he would have to do in the course of the night, and to prepare for it. And, being there, he was called by the manager to the office. The accident, *therefore*," said the learned judge, "happened whilst he was employed about his master's business." It is submitted that, none the less, it is not quite clear that he was engaged at that time in discharging

<sup>1</sup> See *per Brett, L.J., Charles v. Taylor*, 3 C.P.D. at p. 496 (*post*, p. 173).

the duties of the service he had entered into. The point, no doubt, is a fine one; but if it were to extend, as it might very well from the learned judge's statement, to a case where a servant engaged for a special service might be having a conversation with his master "about his master's business," at a time when he was not engaged on the special service; so that such a conversation would make the servant "employed about his master's business," though he was not then carrying out the duties of his particular employment, this would be a very wide interpretation of the meaning of a "fellow-servant." Anyway, it would appear to increase the risks of the workman, which may "in some sense" arise out of his employment.

Brett, L.J., in *Charles v. Taylor*, 3 C.P.D. 492, enunciated what he called one principle, "a formula, though not the only one," as follows: "When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time, that the negligence of one in what he is doing as part of the work he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other." And Cotton, L.J., in the same case, pointed out: "According to the authorities, in order to exempt the master from liability, it is unnecessary that the employment should be of the same nature, if there is a common object, and if it must be taken that for the purpose of effecting that object the master must employ other servants;" and he remarked that there might be cases where the distinction between what is, and what is not, a common employment might be hard to determine.

*Wilson v. Merry*, L.R. 1 S. & D. 326 (*ante*, p. 151), shows that in general a master is not liable to a servant for the negligence of a fellow-servant who happens to be the manager of the concern; and a question arose in *Howells v. Landore Steel Co.*, L.R. 10 Q.B. 62, whether it made any

Brett,  
L.J.'s  
formula. :

A mana-  
ger, or  
foreman,  
is at  
common-  
law none  
the less



a "fellow-servant." difference that the manager (through whose negligence the accident occurred) was a certificated manager appointed by the defendants under sec. 26 of the Coal Mines Regulation Act, 1872. It was held that the statute made no difference.

*Allen v. New Gas Co.* reviewed.

There is a case, *Allen v. New Gas Co.*, 1 Ex. D. 251 (*ante*, p. 151), in which the negligent person was held to be the foreman, and thus a fellow-servant, following *Howells v. Landore Steel Co.* (*supra*), (see also *Feltham v. England*, L.R. 2 Q B. 33); but which presents other considerations. The defendants had on their premises gates which were safe when open and wedged up, but liable to fall when closed. The manager's attention had previously been called to their unsafe condition, and he had promised to have them seen to. As a matter of fact, they had not been seen to. The plaintiff, a workman of the defendants, passed through the gates one day when they were open, but on his return one of them was closed, and while he was working near the gates they fell on him and injured him. This kind of case would now come within the Acts which curtail the master's exemption from liability. It was held on the evidence, that there was nothing to show how the gate came to be closed, nor that the manager and other persons employed by the defendants were incompetent; and as the plaintiff had not brought home any specific act of negligence on the part of the defendant or any of his servants in accordance with *Lovegrove v. L. & B. Ry. Co.*, 33 L.J.C.P. 329, he could not sustain his action; and even if there was negligence, it would have been that of the foreman, who was a fellow-workman. There was also held to be no evidence that the defendants (a joint-stock company) had personally undertaken to superintend the works, nor that the manager was otherwise than a competent person. Upon this reading of the evidence, judgment was given for the defendants; though it would seem to remain doubtful whether the evidence showed that the defendants had, in accordance

with their duty, taken reasonable precautions for their servants' safety. (See *Bartonshill Coal Co. v. Reid*, *infra*.)

A master, though he himself assists in the work, is not a fellow-servant with his servant. A master is therefore responsible for injury to his servant occasioned by his own or his partner's negligence (*Ashworth v. Stainwix*, 30 L.J.Q.B. 182; *Wilson v. Merry*, L.R. 1 S. & D. 326 (*ante*, p. 173)); the contract being to employ competent persons as servants, not to execute the work himself; nor is he regarded as a fellow-servant because he works with them. (*Mellors v. Shaw*, 30 L.J.Q.B. 333.)

But a master, though he assists in the work, is not a fellow-servant.

The defence of common employment is not open in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon the master for the protection of his servants: *Groves v. Wimborne* (1898), 2 Q.B. 402.<sup>1</sup>

Common employment no defence where breach of statutory duty.

An employer is bound, at common-law, as part of his contract, to take reasonable care to carry on his business so as not to subject those employed by him to undue risks. If he does not do so, he would be *primâ facie* liable to an action.<sup>2</sup> So, too, under the Employers' Liability Act. But where employers had had a boat-staging put up by a competent contractor to enable a house to be painted, and the staging was defective, and injured a workman; the employers were held not to be liable to the workman, though the contractors might be liable.<sup>3</sup> Employing a competent contractor, is to do all that the employer is called upon to do for the safety of his workmen.

The duties imposed, by the contract, on the employer.

The duty the master has to discharge is to employ competent servants, so as to protect his other workmen against injury from their incompetency. All the cases dealing with the principle of common employment assume this as

<sup>1</sup> See *ante*, Chap. vii., where the question when a breach of a statutory duty gives a good cause of action is discussed.

<sup>2</sup> *Bartonshill Coal Co. v. Reid*, 3 Macq. 266 (*ante*, p. 152).

<sup>3</sup> *Kiddle v. Lovett*, 16 Q.B.D. 605 (*ante*, p. 33).

beyond doubt. It is no less the master's duty at common-law, to take all reasonable precautions for his servant's safety, not only by employing competent servants, or competent contractors (as in *Kiddle v. Lovett*); but also to take care that the system of carrying on his work is an adequate one. Where an injury results from a defective system of conducting the work, which does not afford proper protection to the workmen, the master is liable.<sup>1</sup>

The various reasons assigned for the doctrine of common employment.

The reasons assigned for the doctrine of common employment are (1) principles of general policy by which the master should be exempted from liability in respect of a multiplicity of actions: *Priestley v. Fowler*, 3 M. & W. 1 (*ante*, p. 146); (2) that the servant, as part of his contract of service, takes upon himself the natural risks incident to its performance: *Morgan v. Vale of Neath Ry.*, L.R. 1 Q.B. 149 (*ante*, p. 170), or that there is a tacit agreement to accept all risks attending the service: *Degg v. Midland Ry.*, 26 L.J. 171 (*ante*, p. 153); (3) the master's liability for an act of the servant is an exception which ought not to be extended; and the servant has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant: *per* Bramwell, B., in *Swainson v. N.E. Ry.*, 3 Ex. D. 341 (*ante*, p. 167), who considered this to be only another way of stating (2); (4) an American judge, Shaw, J., in *Farwell v. Boston Ry. Co.*, 4 Met. (Mass.) 49,<sup>2</sup> thus states it: "The implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."

<sup>1</sup> *Bartonshill Coal Co. v. Reid* (*supra*); *Bartonshill Coal Co. v. McGuire*, 3 Macq. 310; *Sword v. Cameron*, 1 Sc. Sess. Cas., 2nd series, 493.

<sup>2</sup> The judgment in that case is reported, 3 Macq. at p. 316.

It has already been pointed out that, in enunciating the common-law doctrine of common employment, great stress was laid on the argument of convenience. The argument of convenience is, from its very nature, liable to be weakened by a changing condition of the order of things; that which might have been generally convenient half a century ago, may become generally irksome to-day. As a matter of fact, this change is occurring. The irksomeness of this common-law doctrine is now manifesting itself; the general convenience is undergoing a change, and the balance is shifting. Effect can only be given to this new state of things by the force of the Statute Law, and this has in part been brought about by the Employers' Liability Act, and the Workmen's Compensation Act. The tendency of to-day is to shift the risk of injury from the workmen's shoulders on to the masters', and, in lieu of making this risk one which the workman has to bear as part of his contract of service, to make it one of the ordinary risks the master has to run, as part of his working expenses. The notion that the workman's wages are regulated by the amount of the risk the common-law casts upon him is now in general untrue in fact. Wages are not, for the most part, determined on any such consideration. The idea that a workman deliberately "selects" his employment, in the sense of weighing the risks of injury he runs in any particular service, and with a view to minimizing them, if it ever was true in fact, has under the modern developments of labour become an exploded idea. The observer who notes these changes may with some certainty predict, that the common-law doctrine will not long survive either the statutory knocks it has already received, or its ever-growing inapplicability to modern labour conditions; and that the argument of convenience, which was used to assist at its birth, will be again invoked as a reason for its demise.

## CHAPTER XV.

### *As to negligence under the Employers' Liability Act— The Workmen's Compensation Act.*

Negli-  
gence  
under the  
Em-  
ployers'  
Liability  
Act.

UNDER the Employers' Liability Act, 1880, the doctrine of common employment, in the cases specified in the Act, is done away with; and, in those cases, the workman "shall have the same remedies . . . against the employer, as if the workman had not been a workman or in the service of the employer." This enactment, while not entirely abolishing the common-law doctrine, alters its incidence. The cases to which it applies are set out in the 1st section of the Act, and are qualified by the provisions of sec. 2. They are, where the injury is caused to a workman—

Circum-  
stances to  
which the  
Act  
applies.

1. By reason of a defect in the ways, works, machinery, or plant (sub-sec. 1).
2. From the negligence of any one who is acting as a superintendent in the service of the employer (sub-sec. 2).
3. From the negligence of any one in the employer's service whose orders the workman is bound to obey, where the injury arises out of such obedience (sub-sec. 3).
4. From the act or omission of any one in the employer's service in respect to the employer's rules or bye-laws, or in obedience to particular instructions given by any one clothed with the employer's authority (sub-sec. 4).
5. From the negligence of any servant of the employer

in charge of any signal, points, engine, or train upon a railway (sub-sec. 5).

"A workman" is defined as a railway servant, and any person to whom the Employers and Workmen Act, 1875, applies<sup>1</sup> (sec. 8).

The qualifying provisions of sec. 2 are—

Sec. 2.—A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say—

- (1) Under sub-sec. 1 of sec. 1 (unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition).
- (2) Under sub-sec. 4, sec. 1 (unless injury arose from defect, etc., of bye-laws).
- (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer,

<sup>1</sup> Under the Employers and Workmen Act, 1875, by sec. 10, "workman" does not include a domestic or menial servant, but means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under or above 21, has entered into, or works under a contract with an employer, whether the contract is made before or after the passing of the Act (September 1, 1875), be express or implied, oral or written, and be a contract of service, or a contract personally to execute any work or labour. In deciding who is a "workman" under this Act, "manual labour" is the keynote to it: *per* Lindley, J., *Grainger v. Aynsley*, 6 Q.B.D. 182. See also *Jackson v. Hill*, 13 Q.B.D. 618; *Morgan v. L.G.O. Co.*, 12 Q.B.D. 201; 13 Q.B.D. 832, where an omnibus conductor was held not to be a "workman;" *Cook v. Metropolitan District Tram. Co.*, 18 Q.B.D. 683, nor the conductor of a train-car; and *Yarmouth v. France* (*ante*, p. 131).

or such superior, already knew of the defect or negligence.

Where the doctrine of common employment still applies.

Where the accident arises from the negligence of a fellow-workman who is not acting in any of the capacities defined by sub-secs. 3, 4, or 5, the doctrine of common employment still applies to prevent the injured workman from maintaining his action. In *Shaffers v. General Steam Navigation Co.*, 10 Q.B.D. 356, the accident arose from the negligence of one Jones, who was employed, with the plaintiff and others, by the defendants in loading sacks of corn into the hold of a ship. His duty was to guide the beam of the crane with a guy-rope, and also to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and in consequence the sacks fell down the hatchway and hurt the plaintiff. Here it was found that Jones was acting in a double capacity—in superintending the working of the crane, and also as a manual labourer, and that the accident was due to his negligence when acting in the latter capacity, and not “while in the exercise of such superintendence” within the Act. The plaintiff was accordingly non-suited. So, too, in *Kellard v. Rooke*, 21 Q.B.D. 367, the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of plaintiff’s gang being one Bodfield, who was himself a labourer working on deck. He gave the signal to the men below when the bales were being dropped down the hatchway. Plaintiff, who was below, was injured by a bale, which was dropped down without sufficient warning being given by Bodfield. It was held by the Court of Appeal that plaintiff was not entitled to recover under the Act, as Bodfield was not a person who had superintendence entrusted to him within sec. 1, sub-sec. 2, as defined by sec. 8; nor, if Bodfield had been such a person, was there any evidence that the injury resulted from the plaintiff having conformed to any order of Bodfield’s within sec. 1,

Illustrations of cases where a man is not exercising superintendence.

sub-sec. 3. (See also *Snowden v. Baynes*, 25 Q.B.D. 193; 25 Q.B.D. 193.) But *Osborne v. Jackson*, 11 Q.B.D. 619, shows, that a person exercising superintendence is within the Act, although the superintendent, when negligent, was voluntarily assisting in manual labour. *Shaffer's case* was distinguished on the ground that while Jones was there acting in two capacities, the negligent foreman here was generally superintending the work; and he was guilty of negligence "whilst in the exercise of such superintendence." Although he was also at the time voluntarily assisting the men, this was held none the less to be negligence of a superior within the Act.

As regards sub-sec. 5 of sec. 1, it has been held that a man had not "charge or control" of the points on a railway within the Act under the following circumstances. Fisher was employed in the signal department of the defendants' railway to clean, oil, and adjust the points and wires of the locking apparatus along a portion of the line, and to do slight repairs. For this purpose, he and others were under an inspector of the same department, who was responsible for the gear being kept in an efficient state. The signals and points were worked by other men in the signal-boxes. Fisher, having taken the cover off some points to oil them, negligently left it projecting over the metals, whereby an injury was caused to a fellow-workman (the plaintiff). The defendants were not held liable.<sup>1</sup> It may be observed that there was nothing to show why the plaintiff was not "a railway servant," and thus "a workman" to whom sec. 8<sup>2</sup> of the Act applies. The point does not seem to have been taken in the Court below; and the plaintiff's case would appear to have been wrongly based.

A steam-crane fixed on a trolley and propelled by steam

<sup>1</sup> *Gibbs v. G.W. Ry.*, 12 Q.B.D. 208. See also *Snowdon v. Baynes*, (*supra*).

<sup>2</sup> Sec. 8: "The expression 'workman' means a railway servant, or any person to whom the Employers and Workmen Act, 1875, applies."



“locomotive”  
within the  
Act, and  
“a railway.”

along rails, was held not to be a “locomotive engine” within the Act (*Murphy v. Wilson*, 52 L.J.Q.B. 524); but a temporary railway put down by a contractor for the purpose of constructing railway works, was held to be “a railway” within the Act (*Doughty v. Firbank*, 10 Q.B.D. 358).

The effect of the Act, as interpreted by the decisions, is—

1. In the specified cases, the defence of “common employment” is no longer available.

2. The defence of “contributory negligence” is still available.<sup>1</sup>

Contributory negligence alleged against a plaintiff is not to be confused, as a question of fact, with the other question of fact, whether the plaintiff voluntarily undertook to incur the risk.

3. The defence “*volenti non fit injuria*” is still open, and the point as to whether a plaintiff is *volens* is one of fact.<sup>2</sup>

4. If an apparatus, sound in itself, is unfit for the purpose to which it is applied, or there is a negligent system or mode of using perfectly sound machinery, the master is liable if injury thereby arises.

This was so apart from the Act, and the Act has not taken that liability from the employer.<sup>3</sup>

5. The employer is relieved from liability for injuries resulting from defects which were unknown to him or his deputies. At common-law this ignorance would not have barred the workman’s claim, as it was a breach of duty on the employer’s part if he did not see that his machinery and works were free from defect. But in cases under the Act it is a condition precedent of the workman’s right to recover, that he should have given notice of the defect.<sup>4</sup>

<sup>1</sup> *Stuart v. Evans*, 49 L.T.N.S. 138; *Weblin v. Ballard*, 17 Q.B.D. 122.

<sup>2</sup> *Smith v. Baker* (1891), A.C. 325.

<sup>3</sup> *Heske v. Samuelson*, 12 Q.B.D. 30; *Cripps v. Judge*, 13 Q.B.D. 583; *Weblin v. Ballard* (*supra*); *Bartonshill Coal Co. v. McGuire* (*ante*, p. 159).

<sup>4</sup> *Per Lord Watson, Smith v. Baker* (1891), A.C. at p. 356; *per Lord Esher, Thomas v. Quartermaine*, 18 Q.B.D. at p. 690.

The Workmen's Compensation Act, 1897, is a striking instance of the modern tendency to divert the risks incurred in the course of an employment from the shoulders of the workman, to those of the employer. In the cases to which the Act applies, it enables a workman to recover the compensation provided by the Act for an injury "arising out of and in the course of the employment," without making it necessary to prove any negligence applicable to the employer.<sup>1</sup> Where, however, such negligence exists, the workman may, if he chooses, still take "the same proceedings as were open to him" before the Act, instead of making use of his remedy under it.<sup>2</sup> And if he brings an action for damages under the Employers' Liability Act for injury caused by any act of negligence, and fails in that action, he may, if the circumstances bring him within the Workmen's Compensation Act, notwithstanding that his action is dismissed, apply to the Court before whom the action was tried, to assess the compensation due to him under that Act. In doing so, the Court may deduct from such compensation the costs caused by the plaintiff having brought his action, instead of proceeding under the Act.<sup>3</sup> Moreover, though his action under the Employers' Liability Act be dismissed, and he thereupon applies to have compensation assessed under the Workmen's Compensation Act, and his application is heard and determined, he may, it seems, still appeal against the dismissal of his action.<sup>4</sup>

The Act applies only to employment by "the undertakers," as defined in sec. 7 (1) and (2). And a "workman" (by the same sub-section) is defined as including "every person who is engaged in any employment to which this Act applies, *whether by way of manual labour or otherwise*"—an important extension of the definition of a "workman" under the Employers' Acts of 1875 and 1880—"and whether

<sup>1</sup> Sec. 1 (1).

<sup>2</sup> Sec. 1 (2) (b).

<sup>3</sup> Sec. 1 (4).

<sup>4</sup> *Isaacson v. New Grand, Ltd.* (1903), 1 K.B. 539.

his agreement is one of service, or apprenticeship, or otherwise, and is expressed or implied, is oral or in writing."

"Wilful  
mis-  
conduct."

A workman, however, is not entitled to any compensation if the injury "is attributable to the serious and wilful misconduct of that workman."<sup>1</sup>

It is obvious that if these words should have to be interpreted as a matter of law, they would present many difficulties. So far, however, it has been decided that whether there has been "wilful misconduct" must be treated as a question of fact; and an appeal against a finding of fact that there has been no "serious and wilful misconduct" would be hard to sustain. The inquiry as to this, must ascertain the degree of culpability as a matter of fact: *Rumboll v. Nunnery Colliery Co.*, 80 L.T. 42. In the recent case, *Smith v. Normanton Colliery Co., Ltd.* (1903), 1 K.B. 204, Mathew, L.J., took occasion to say, that he desired to guard against a possible misconception that any deviation whatever from an order of masters would amount to 'serious and wilful misconduct' which would deprive a man of the benefit of the Act.<sup>2</sup> In that case an accident occurred to a workman after he had stopped work for the day—he having been suspended by his "corporal"—and at a place where he had no right to be; and thus the accident did not "arise out of and in the course of his employment" (sec. 1). The Court of Appeal declined to interfere where the County Court judge had fairly come to a conclusion of fact on the evidence, and had not misdirected himself on any point of law. The observation of Mathew, L.J., arose out "of a contention on the defendants' part that the plaintiff had disobeyed orders in

<sup>1</sup> Sec. 1, sub-sec. 2 (c.)

<sup>2</sup> It was held by the Court of Appeal, in *Whitehead v. Reader* (1901), 2 K.B. 48 (distinguishing *Lowe v. Pearson* (1899), 1 Q.B. 261), that disobedience to orders does not of itself prevent the act done by the workman from being an act done "in the course of his employment" under the Act.

remaining where he was at the time of the accident; but the County Court judge found as a fact, that the order to go to another part of the pit "had not been given in such a distinct and peremptory manner as to make disobedience to it serious and wilful misconduct."

If death results from an injury sustained by a workman, and the accident arises out of and in the course of his employment, this is sufficient to enable compensation to be obtained under the Act. It is not material that the death was not in fact the "natural and probable cause" of the injury.<sup>1</sup> The workman under the Act is therefore, in this respect also, in a better position than one who sues in tort for damages arising out of a breach of duty; for the measure of the liability there would be limited to the reasonable and probable consequences of the breach of duty.

On the question whether an accident has arisen out of and in the course of his employment, where an accident happens to a workman while engaged at his work, through the tortious act of a fellow-workman, which has no relation whatever to their employment—such as throwing a missile—this is not an accident arising out of the employment within the Act.<sup>2</sup> "The accident," said Collins, M.R., "did not arise from anything which by any stretch of language can properly be said to be incidental to the employment of either."

<sup>1</sup> *Dunlam v. Clare* (1902), 2 K.B. 292.

<sup>2</sup> *Armitage v. L. & Y. Ry.* (1902), 2 K.B. 178.

## CHAPTER XVI.

*Volenti non fit injuria, as discussed in Thomas v. Quartermaine, Yarmouth v. France, and Smith v. Baker—Also in cases not of master and servant—Legal maxims.*

THE Roman Law as derived from Justinian, and as taught in the famous schools of Bologna, exercised an enormous influence upon many parts of Europe. About the time of Henry III. and Edward I., Hallam tells us, it acquired some credit in England, but it fell into desuetude, and even into contempt, in mediæval times. None the less, our common-law has in many instances been greatly modified by its influence, and many of the maxims of Roman jurisprudence, moulded and adapted as they passed through the hands of our judges, have become integral parts of the common-law.

*Volenti  
non fit  
injuria.*

One of the maxims of the Roman Digest assimilated by our common-law is, *volenti non fit injuria*, by which is meant, that he who voluntarily incurs a risk, suffers no legal wrong if injury to himself thereby results; and it has recently been elaborately and exhaustively discussed in the cases it is now proposed to review.

In the process of that discussion the meaning of the maxim has received important qualifications. The main result arrived at appears to be, that the maxim raises no implication of law that a man is *volens*; but is only a statement of the law as applicable when, upon a review of all the circumstances, he is found as a matter of fact to

have voluntarily incurred the risk. The facts are not to be fitted to the maxim, but the maxim must fit the facts.

The stringency of the meaning of the maxim in the Civil Law has long been relaxed;<sup>1</sup> and the interpretation now given to it establishes these points:—

1. Mere knowledge of the risk does not necessarily involve consent to incur it;<sup>2</sup> there must also be appreciation of the nature of the risk, and consent to incur it; and this must be determined as a question of fact. “There may be a perception of the existence of the danger without comprehension of the risk,” said Bowen, L.J., in *Thomas v. Quartermaine*,<sup>3</sup> when delivering one of those luminous judgments which are an intellectual pleasure to read. And again: “There may again be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily.”

The interpretation of the maxim.

2. The jury ought to be able to find that a plaintiff consented or agreed to take upon himself the particular risk which caused his injury, in order that his claim can be defeated by the application of the maxim.

This consent may be either express or implied; and it may be inferred from a general course of conduct.

3. But where the essential cause of the risk is the complainant's own act, he cannot be said not to have consented to do the thing he is himself doing: as where a sailor mounts the rigging of a ship, he cannot be heard to say, if he injures himself, that he had not voluntarily incurred the natural risks attendant upon mounting a rigging. Nor even, in such a case, if the risk leads to a disaster due to the defendant's breach of duty: as where a workman knows that he cannot perform a certain act, owing to a defect in a machine, without the risk of losing a limb, yet elects to perform it.

<sup>1</sup> Per Lord Watson, *Smith v. Baker* (1891), A.C. at p. 355.

<sup>2</sup> *Thomas v. Quartermaine*, 18 Q.B.D. 685; *Yarmouth v. France*, 19 Q.B.D. 647; *Smith v. Baker* (*supra*); *Clark v. Holmes*, 31 L.J. Ex. 356.

4. If the plaintiff knows of the existence of the risk and appreciates, or has the means of appreciating, its danger, he cannot be said necessarily to be *volens* from the mere fact that he continues at the work. "Where a servant has been subjected to risk *owing to a breach of duty* on the part of the employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine '*volenti non fit injuria*,' which has no application to such a case."<sup>1</sup> Or as Lindley, J., put it in *Yarmouth v. France*, 19 Q.B.D. 647: "If nothing more is proved than that the workman saw danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury may properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself."

The question whether the plaintiff has acted voluntarily is, therefore, one of fact. That is for the jury. But this does not conclude the matter, for the jury may have found the facts upon evidence which does not justify their verdict. This is for the Court to decide, if the question has been left to the jury.

It has been already decided that the defence *volenti non fit injuria*, as a question of fact, is one which can be set up as an answer to an action under the Employers' Liability Act, 1880.<sup>2</sup>

The facts  
of *Thomas*  
*v. Quarter-*  
*maine*.

*Thomas v. Quartermaine*, 18 Q.B.D. 685, was an action brought under the Employers' Liability Act, and the facts, as found by the County Court judge, were that a boiling-vat and a cooling-vat were placed in the same room in the defendant's brewery. A passage, only three feet wide in one part, ran between these two vats, the rim of the cooling-

<sup>1</sup> *Per* Lord Herschell, *Smith v. Baker* (1891), A.C. at p. 365.

<sup>2</sup> *Smith v. Baker* (1891), A.C. 325; *Thomas v. Quartermaine*, 18 Q.B.D. 685.

vat rising sixteen inches above the passage. The plaintiff, who was employed in this room, went along the passage in order to get a board from under the boiling-vat, which was used as a lid. As the lid stuck, the plaintiff gave an extra pull, which caused the board to come away suddenly, and the plaintiff, falling back into the cooling-vat, was severely scalded. The County Court judge held, that there was evidence of a defect in the condition of the works, inasmuch as there was no sufficient fence to the cooling-vat; but he found that the condition of the vat was known both to the plaintiff and to the defendant; and also that the plaintiff had not been guilty of contributory negligence. He gave judgment for the plaintiff; the judgment was set aside by the Divisional Court, and an appeal to the Court of Appeal was dismissed.

This case, in the Court of Appeal, was understood, it was said, by County Court judges as deciding, that if a plaintiff goes on with his work and does not quit his employment after he knows of the defective condition of the premises, although a breach of duty on the employer's part is made out, this is a conclusive answer to an action brought by the plaintiff. And in *Smith v. Baker* (1891), A.C. 325, in the House of Lords, Lord Herschell also appeared to think, from the decision in *Thomas v. Quartermaine*, 18 Q.B.D. 685, that the majority of the Court held, that because the County Court judge had found that the defective condition of the plant was known to the plaintiff as well as to the defendant, the maxim applied, and the defendant was entitled to judgment. From this view he expressed dissent, saying it could not be so held as a matter of law. Yet on reading with care the two judgments in *Thomas v. Quartermaine* which decided the case, it is difficult to perceive that they laid down any such proposition of law. On the contrary, the judges came to the conclusion on the facts, that the plaintiff both knew of the danger and appreciated its extent, and with that

The  
decision  
misunder-  
stood.



knowledge and appreciation voluntarily elected to encounter the risk. They then applied the law to that state of facts so found by themselves. Where, however, in the opinion of Lord Esher, and it would seem of Lord Herschell also, this decision was at fault, was that the judges took upon themselves to find the fact that the plaintiff appreciated the danger and voluntarily incurred it. It was not their province to find the facts. This question was one of fact, not of law, and therefore it was for the jury (or the County Court judge) to determine it. The County Court judge had not found as a fact that the plaintiff had voluntarily incurred the risk. He merely found that the defect was known both to the plaintiff and to the defendant, and that the former was not guilty of contributory negligence. His decision of the case, therefore, was open to the criticism, that he had not found the facts which it was necessary to find before the law could be applied. The judges' decision in the Court of Appeal was not open to that criticism, but was amenable to the observation, that they had exceeded their province in finding the facts which made their decision good in law. Bowen, L.J.'s, view was, that where the known circumstances can only lead to one inference, there is no fact left to find. That was putting it rather as an inference of fact, than one of law. One can hardly appreciate from the facts that had been found in *Thomas v. Quartermaine*, how any other inference of fact remained open than that the plaintiff had voluntarily incurred the risk, knowing and appreciating it. It is true that Lord Morris, in *Smith v. Baker* (1891), A.C. 325, concurred in the judgments delivered by Bowen and Fry, L.JJ., in *Thomas v. Quartermaine*; but he seems to have done so on the ground that there the danger was visible, and the risk appreciated, and that the evidence admitted of no other conclusion than that the plaintiff voluntarily undertook the risk. It is clear that if the County Court judge had found that the plaintiff had not accepted the risk, knowing and

appreciating its danger, Lord Morris would have held that the evidence did not justify the finding; and perhaps he might have considered it superfluous to send back the case to the County Court judge to formally find as a fact what, in his lordship's view, was patent from the evidence, and was the only reasonable inference of fact that could be drawn from the ascertained facts. None the less, as it has been held that this question, as an element of consent, is one of fact, the fact must be found by the only tribunal capable of dealing with questions of fact.

The dissentient judge in *Thomas v. Quartermaine* was Lord Esher, M.R., and the ground of his dissent was based on his construction of the Employers' Liability Act, 1880. His view was, that the Act had taken away from the master the defence of *volenti non fit injuria*; that it placed the workman or servant on a footing with other persons who were not servants, and no contract to take risks incidental to a particular service could exist in the case of persons who were not servants. The view of the Act taken by the majority of the Court, Bowen and Fry, L.JJ., was, that (with certain exceptions) it placed the workman in a position as good, but no better, than that of other persons who use the master's premises at his invitation on business; and that the defence of *volenti non fit injuria* was not in any way affected by the Act. "I employ a builder," said Bowen, L.J., "to mend the broken slates upon my roof, and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had its slates mended?" The man who went upon the roof to mend the slates would have done so knowing what he was going to do, and knowing the risks involved. "In the case now before us, the negligence now relied on by the plaintiff is that a vat in the room in which he worked was left without a railing. Let us suppose that the defendant, impressed with the danger, had actually sent for a builder to put one up, and

Lord  
Esher's  
judgment  
in *Thomas*  
*v. Quarter-*  
*maine*

the builder had fallen in while executing the work. Would the defendant have been guilty of a breach of duty towards the builder? The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk, *volenti non fit injuria*."

Fry, L.J., asked: "If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation. Can such a person maintain an action in respect of an injury arising from a defect, of which defect and of the resulting damage he was as well informed as the defendant? I think not. To such a person it appears to me that the maxim *volenti non fit injuria* applies."

Lord Esher, M.R., thought that the Act "recognizes, if it does not impose, a duty on the part of the master not to have his ways, machinery, or plant in such a defective condition as to cause injury to the servant, and if he fails in this, he is not at liberty to set up that the injury arose by the negligence of a fellow-servant of the plaintiff, nor that the plaintiff, whether he knew or did not know of the defect, had contracted that he would take the risk upon himself." The reply to this construction is afforded by Bowen, L.J., who, after saying that the language of the Act does no more than remove the disabilities under which the workman, by reason of the relation of master and workman, was placed by the common-law, continues: "An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition. It cannot in the case of a defect in the employer's

works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. . . . What sort of duty could that be which does not exist at law, and which is not defined by statute? It would be a duty that had no limits except the benevolence of a jury exercised at the expense of the pockets of other people."

In the case of *Yarmouth v. France*, 19 Q.B.D. 647, the matter came before the Court of Appeal on the finding of the County Court judge, who so understood *Thomas v. Quartermaine* as to bind him to hold that, as the plaintiff continued to drive a horse after he knew of its vicious character, he must be taken, as an implication of law, to have assented to take the risk of driving it upon himself. The case was sent down for a new trial. The plaintiff had been told by the defendant's foreman, when he complained and said that the horse was not a fit one to drive, that he was to go on driving it, and if any accident happened, his employer would be responsible. Though it may have been that the foreman had no authority to pledge his master in this way, it is evident that such a statement, authorized or unauthorized, would be likely to have a very definite importance in considering whether the workman voluntarily consented to take the risk upon himself. That question had not been considered by the County Court judge as a question of fact, but as a matter of law; and it was held by the majority of the Court, that there was evidence which might justify a finding of fact, that the risk was not under these circumstances voluntarily incurred by the plaintiff.

In *Thomas v. Quartermaine*, on the other hand, it was held that there was no evidence which could justify such a finding.

The case of *Yarmouth v. France* was brought under the Employers' Liability Act, 1880, and it was argued that,

apart from the Act, the plaintiff could not recover; because the plaintiff, who drove the vicious horse, well knew its vicious character. He, therefore, incurred a risk which was a visible and open one, and being of that nature, he must be taken, as an implication of law, to have appreciated the risk, and to have consented to incur it. This, it was contended, was the interpretation given to the maxim before the Act, viz. that a workman impliedly consents to incur risks of that nature, and the Act itself did not affect that interpretation. Such an implication of law would have shut out the real fact, viz. that the plaintiff was induced to continue the work by means which did not make his doing so a voluntary act on his part. By the Act, a workman can recover if any defect in the plant caused his injury (sec. 1, sub-sec. 1), or (sub-sec. 2) if the injury arose from the negligence of any one employed by the master who exercised superintendence; but by sec. 2, sub-sec. 1, he shall not be entitled to recover under sec. 1, sub-sec. 1, unless the defect arose from, or had not been remedied owing to the employer's negligence or that of the person in charge. By sub-sec. 3, where the workman knows of the defect or negligence, and fails to give notice of it to the employer, or to "some person superior to himself," he shall not recover, unless he knows that the employer, or the superior person, is already aware of the defect or negligence. It was held that the horse was "plant," and that there was evidence that the defect arose from the negligence of the person in charge, who had had notice of it, and had failed to remedy it. But it was contended that the implied contract at common-law, above referred to, prevented the workman from recovering. Lord Esher thought, on the construction of the Act, that if the workman gives notice of the defect, and it is not remedied, he can recover, unless he is within the maxim *volenti non fit injuria*. Whether the plaintiff is *volens* is a question of fact. The County Court judge "did not apply his mind

to the motives which induced the plaintiff to act as he did—whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders." Lord Esher added that all that was for a jury, and the County Court judge (acting as a jury) ought to have applied his mind to it.

So far, there seems to be no difficulty in that judgment. But Lord Esher, in holding that the case was one within the Act, also said that if the case were not within it, "then, according to the old law, if that Act had not existed, I have no doubt this plaintiff could not have recovered," and went on to show that the maxim would have precluded him. The difficulty in Lord Esher's judgment in *Yarmouth v. France*. The difficulty arising out of the judgment of the M.R. is, in apprehending why the effect of the Act was to render the maxim inapplicable, while he admitted that, apart from the Act, it would have afforded a good defence. He said he found it very difficult to give a sensible construction to sub-sec. 3 of sec. 2; but he inferred from it that, if the workman gives notice, and the defect is not remedied, he may recover. He asked, when is this notice to be given? And if the defect is not at once remedied, is he to refuse to incur the risk, and to quit the employment? Then he thought it clearly enunciated by that sub-section that "if the workman gives notice of the defect, and the employer fails to remedy it, the workman's claim for compensation is valid, *unless he is brought within the maxim volenti non fit injuria*." That does not seem to remove the difficulty already adverted to, because the learned judge makes the admission that, apart from the Act, the plaintiff was brought within the maxim, and could not recover.<sup>1</sup>

Lord Esher's view, as expressed, or understood to be expressed, in *Thomas v. Quartermaine*, that the Act took

<sup>1</sup> See, too, *Woodley v. Metropolitan District Ry.*, 2 Ex. D. 384, distinguished in *Thrussell v. Handyside*, 20 Q.B.D. 359.

away from the master the defence of *volenti non fit injuria*, could no longer be regarded as correct after the decision in that case. It was the view which had been taken in *Weblin v. Ballard*, 17 Q.B.D. 122, which case was overruled in the course of the judgment delivered by Bowen, L.J., in *Thomas v. Quartermaine*. Lord Esher, however, in commenting upon his own judgment in that case, said (in *Yarmouth v. France*): "I never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim *volenti non fit injuria*." This is certainly not the impression conveyed by the language used by the learned judge in his judgment in *Thomas v. Quartermaine*. The view put forward by him in *Yarmouth v. France*, and one which it is difficult to follow, is that although the plaintiff would have been precluded from recovery by reason of the operation of the maxim, yet that the effect of the Act was to enable him to recover, "unless he is brought clearly within the maxim." But in the view of the learned judge he was so clearly within it that, apart from the Act, he could not recover. A careful consideration of Lord Esher's judgment in *Yarmouth v. France* fails to make it clear how, if the maxim otherwise applied, the Act so affected its operation as to enable the plaintiff to recover.

Both Bowen and Fry, L.JJ., in *Thomas v. Quartermaine*, agreed that the Act placed the workman in the same position as a stranger who is lawfully on the premises by the occupier's invitation, "but in no higher or better position;" and that the maxim would apply in proper circumstances to such a person, and therefore to a servant suing under the Act. This view leaves the operation and the interpretation of the maxim unaffected by the Act.

The judgment of Lindley, L.J., in *Yarmouth v. France*, however, is not hampered by the difficulty which Lord Esher's judgment appears to present. He nowhere admits that at common-law (as regards the application of the

Lindley,  
L.J.'s,  
judgment  
in *Yarmouth v. France*.

maxim) the facts would have prevented the plaintiff from recovering. He deals with the maxim apart from the Act; holding, not that the Act affected the interpretation of the maxim; but, on the contrary, that the Act did not preclude its application; and thereupon, discussing it, he held that in considering whether it applies, the question of fact remains whether the plaintiff voluntarily incurred the risk, notwithstanding that he knew and appreciated the danger, and yet continued in his employment. He accepted *Thomas v. Quartermaine* as deciding (*inter alia*) that in each of the cases specified in sec. 1 of the Act, the maxim is applicable; and if a workman, knowing and appreciating the danger, elects to incur it, he can no more maintain an action under the Act, than he could have done before the Act was passed. But the true construction and the application of the maxim involved, in his opinion, the question of fact whether he had so elected. The question must be, beyond whether the plaintiff knew of the risk, "whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff;" and this question must be answered affirmatively before the maxim can be said to apply. It will be observed that this view of the maxim does not conflict with the view of the majority who decided *Thomas v. Quartermaine*; the difference is that while Lindley, L.J., thought that these matters must be left to a jury to determine, Bowen and Fry, L.JJ., thought that there was nothing left to be determined, where the facts necessarily lead to only one reasonable and possible conclusion of fact; but in both views the question whether a man is *volens* or *nolens* is to be determined as a fact, and not by any implication of law.

Lindley, L.J., thought that in the cases mentioned in the Act, a workman not engaged to incur a particular danger, finding himself exposed to it, and complaining about it, cannot be held, as a matter of law, to be *volens*,



merely because he does not refuse to face it. "Nor can it, in my opinion, be held," he continues, "that there is no case to submit to a jury on the question whether he has agreed to incur it, or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred. *A fortiori* might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good. Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself. I cannot construe the Act as shutting out such considerations as these."

That being the construction of the maxim adopted by the Lord Justice, these questions of fact are open upon the inquiry whether the maxim applies, without regard to the Act at all. Bowen, L.J., in *Thomas v. Quartermaine*, does not admit, and, as before pointed out, this appears to be the only point of difference between him and Lindley, L.J., that any question of fact can be said to arise, where the inference left open on the facts can only lead to one conclusion; that is, one conclusion of fact. While he admits that "knowledge is not a conclusive defence in itself," he adds, "but when it is knowledge under circumstances that leave no inference but one, viz. that the risk has been voluntarily encountered, the defence seems to me complete."

The  
judgment

Lopes, L.J., the dissentient judge in *Yarmouth v.*

France, took a different view of the construction of the maxim, and thought that as the plaintiff both knew and appreciated the danger, and yet continued in his employment, he was *volens* by implication of law, as the effect of the maxim; and he cited with approval Cockburn, C.J.'s, judgment in *Woodley v. Metropolitan District Ry.*, 2 Ex. D. 384.<sup>1</sup>

Dealing with the Act, he thought the construction of sub-sec. 3 of sec. 2 was, that while before the Act knowledge would have prevented the workman from recovering, since the Act knowledge, in the specified cases, does not have that effect, provided the workman gives notice of the danger; but that if after giving notice, he continues in his employment, knowing the danger, the same legal inference arises as before, viz. that he voluntarily runs the risk; and any evidence of negligence arising from the employer's breach of duty is displaced by the workman being *volens*.

He disregarded the evidence as to what the foreman had told the plaintiff, on the ground that it was no evidence against the defendant; and he did not regard the effect that such a statement might have had on the plaintiff's mind in considering the question of fact whether the plaintiff voluntarily ran the risk, because he did not admit, in interpreting the maxim, that any such question of fact arose. He adopted the decision in *Woodley v. Metropolitan District Ry.*<sup>1</sup> (*supra*), to the effect that if a man continues his employment, rather than run the risk of dismissal, after knowing all the dangers, he must, in point of law, be said to have accepted them; and he saw nothing in the Act to exclude this legal inference.

He disposed of the point made by Lord Esher, and apparently also by Lindley, L.J., that the plaintiff was not employed to drive a vicious horse, by pointing out that after he knew the horse was vicious he continued to

<sup>1</sup> Distinguished in *Thrussell v. Handyside*, 20 Q.B.D. 359.

drive it. This conduct would certainly seem to imply that, though the plaintiff was not originally engaged to drive a vicious horse, he had subsequently accepted that duty as part of his employment. Whether, however, he had voluntarily accepted it, in the sense of taking the risk upon himself, was a matter which Lopes, J., considered was concluded by the application of the maxim, which imports an implication of law; while the majority of the Court were of opinion, that the question whether under the circumstances the plaintiff was *volens*, was a question of fact, which must first be determined before the maxim could be applied.

Injury  
arising  
from  
breach of  
a statutory  
duty.

In *Baddeley v. E. Granville*, 19 Q.B.D. 423, the injury to the plaintiff arose from the breach of a statutory duty on the defendant's part; and the judge, following the opinion expressed by Bowen and Fry, L.JJ., in *Thomas v. Quartermaine*, decided that the maxim has no application where the injury arises from a direct breach of a statutory obligation. The plaintiff was well aware that the statutory duty imposed on the defendant, a coal-owner, was habitually disregarded; but the defence that he voluntarily undertook the risk was not allowed to succeed. A voluntary acquiescence in the breach of a duty imposed by statute could not absolve one who was guilty of disobeying the statute.

Distinction  
between  
*Thomas v. Quartermaine*  
and  
*Yarmouth v. France*.

The distinction between *Thomas v. Quartermaine* and *Yarmouth v. France* seems tolerably clear, although on a superficial view they appear to clash. In the former case, it could be inferred as a fact that the plaintiff was *volens*. He knew of the defect in the plant, and elected to run the risk; nor were there any other circumstances which could lead to a conclusion that he had been influenced in any way in continuing his employment, so that he might, as a fact, be found not to be *volens*. In *Yarmouth v. France*, on the other hand, though the plaintiff had, with knowledge of the defect, continued to drive the horse, there

was evidence to show that he might not have voluntarily consented to incur the risk of driving it.

This maxim was further discussed, explained, and *Smith v. Baker* authoritatively interpreted by the House of Lords in *Smith v. Baker* (1891), A.C. 325,<sup>1</sup> which was also an action brought in the County Court under the Employers' Liability Act, 1880. It is a very important, and in many ways a very interesting case. Although it was held that the point whether there had been any negligence was not open to the defendants (the respondents), because that point had not been taken in the County Court where the action was tried, there was a remarkable disagreement amongst the judges as to whether there was, or was not, any evidence of negligence. The whole history of the case too, through the Court of Appeal, and in the House of Lords, presents remarkable instances of difference of judicial opinion. But as the respondents were shut out from contending that they had not been negligent, the attention of the House of Lords was concentrated on the question whether the workman (the appellant) had accepted the risk voluntarily; and the discrepancy of opinion on that point in the Court of Appeal and in the House of Lords, is probably due to the consideration that this is a question of fact, and that no arbitrary rule of law decides it.

The facts of the case were, that the plaintiff was employed by the defendants, who were railway contractors, to drill holes in a rock cutting, near to which was a crane worked by other workmen of the defendants. This crane lifted stones, and at times swung them over the plaintiff's head; and when this was done no warning was given to the plaintiff. The plaintiff was aware of the danger of this proceeding, and had been thus employed for some time. A stone fell from the crane whilst being swung

The facts  
of *Smith*  
v. *Baker*.

<sup>1</sup> See also *Membery v. G.W. Ry.*, 14 App. Cas. 179; and *Williams v. Birmingham Battery Co.* (1899), 2 Q.B. 338.

over the plaintiff and injured him severely. Several questions were left to the jury by the County Court judge, who found that the machinery for lifting the stone, "taken as a whole," was not reasonably fit for the purpose; that the omission to supply special means of warning was a defect in the ways, works, machinery, and plant within the Act; that the defendants were negligent in not remedying the defect; that the plaintiff was not guilty of contributory negligence; and that he did not voluntarily undertake a risky employment with a knowledge of its risks. They returned a verdict for the plaintiff for damages.

It has been submitted (*ante*, p. 200) that *Thomas v. Quartermaine* and *Yarmouth v. France* are not in themselves contradictory or irreconcilable; but on appeal to the Divisional Court, the learned judges of that Court declared that these cases were not reconcilable, and thought it desirable that they should be explained by the Court of Appeal. Accordingly they dismissed the appeal, and granted leave to appeal.

The Court of Appeal (Lord Coleridge, C.J., Lindley and Lopes, L.JJ.) reversed the judgment of the Court below, mainly on the ground that there was no evidence of negligence by the defendants, although the L.C.J. thought that the judgment ought also to be set aside on the ground that the plaintiff had been engaged to perform a dangerous operation and took the risk upon himself. The House of Lords reversed the decision of the Court of Appeal (Lord Bramwell dissenting). Their decision was, that when a workman engaged in an employment not in itself dangerous—the drilling of holes here not carrying with it any element of danger—is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the employer's negligence—the mere fact that the workman continues in such employment with full knowledge and

understanding of the danger, is not conclusive to show that he undertook the risk so as to make applicable the maxim *volenti non fit injuria*.

Although it was held, under the circumstances previously mentioned, that the verdict of the jury by which the defendants were said to have been guilty of negligence could not be disturbed; and though that decision was accepted as part of the proposition which was being discussed, the learned law lords nevertheless entered upon the question of negligence, and with curious results. The Lord Chancellor thought there was evidence of negligence for the jury to consider, and was not disposed to think that their findings were unjustified; Lord Watson also considered there was sufficient warrant in the evidence to justify the findings; and Lord Herschell was far from being satisfied that there was no evidence of negligence. Lord Bramwell, on the other hand, thought it clear there was no evidence of negligence in the defendants at all; and Lord Morris found nothing to support the finding that the machinery was defective or was negligently used; and all the three judges of the Court of Appeal thought there was no evidence of negligence. This wealth of judicial discrepancy forms, indeed, a very respectable testimony to the difficulty of determining what constitutes negligence.

On the question whether the plaintiff had voluntarily undertaken the risk, very instructive interpretations of the meaning of the maxim *volenti non fit injuria* were delivered. The Lord Chancellor stated his opinion to be, "that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk on himself;" although, as he pointed out, such consent might be inferred from the course of conduct, as well as expressly proved.

The difficulty in determining what is evidence of negligence illustrated by judicial difference of opinion.

Lord Halsbury's view of the maxim.

Applying that, he pointed out that the plaintiff had his attention fixed on the work he was doing, which prevented him from looking out for stones being slung over his head ; and the plaintiff never did consent, or would have consented, to the particular act which caused the injury. He would have said, "If you will not warn me when the stone is going to be slung over my head, then let me look out for myself, and do not keep me employed upon an operation which prevents me doing so." The proposition upon which the defendants relied went, he said, beyond that involved in the maxim. It extended to saying, that wherever a person knows there is a risk of injury to himself, he debars himself from complaining, if an injury happens to him in doing anything which involves that risk. And he shows that such a proposition ought to have prevented any one from getting damages for being run over in the London streets, where every one knows that in making use of them some risk is involved. He then quoted with approval Bowen, L.J., who said in *Thomas v. Quartermaine*, 18 Q.B.D. 685, "the maxim is not '*scienti non fit injuria*' ;" and Lindley, L.J., who remarked in *Yarmouth v. France*, 19 Q.B.D. 660, "The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." The plaintiff here, in the opinion of the Lord Chancellor, so far from consenting, did not even know of the particular operation that was going on over his head until he was struck ; and consent was therefore out of the question. It was not a case, as Lord Coleridge considered, where a man had been engaged to perform a dangerous task.

Lord  
Watson's  
view.

Lord Watson, dealing with the question, "the only substantial one," whether the jury were warranted on the evidence in finding that the plaintiff did not voluntarily undertake the risk, said the verdict could not be lightly

set aside. The maxim, borrowed from the civil law, had, he said, lost much of its literal significance. After explaining the maxim much as the Lord Chancellor had explained it, he added, that when the workman's acceptance of the risk is left to implication, he must have known of its existence, and appreciated, or had the means of appreciating, the danger, in order reasonably to be held to have undertaken it. "But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance." Whether it has that effect or not, "depends to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case." He distinguished between cases where danger is necessarily inherent, and those which are not. In the former case, the workman must rely on himself, and, in the absence of express stipulation, accepts the risk of injury. In the latter case, no rule as to the operation of the maxim can apply to all the various relations of the workman to the danger. "In the circumstances of this case, the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it." The fact had been found by the jury, that he had not accepted the risk. In the opinion of some of the judges, this finding was not unreasonable; and all the judges (except Bramwell, B.) considered themselves bound by that finding.

The mere fact that the workman continues his work after knowledge of its danger, does not necessarily show him to be *volens*. Distinction between cases where danger is, and is not, inherent.

Lord Herschell makes the same distinction between employments which are, and are not, intrinsically perilous. He points out how the fact of a workman continuing his work, where he runs a risk occasioned by the employer's negligence, operates upon the maxim *volenti non fit injuria*. But he says, "Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of his employer's

Lord Herschell's view.



negligence, and the creation or enhancement of danger thereby engendered." This proposition, so stated, would seem to indicate that whether the work is, or is not, intrinsically dangerous, the workman cannot be held, as a matter of law, to voluntarily incur any extraneous risks. Though, as Lord Herschell points out, where intrinsically dangerous work is undertaken, notwithstanding reasonable care to minimize the danger, the workman, if he suffers, has no cause of complaint. While agreeing with the judgment in *Yarmouth v. France* (*ante*, p. 193), Lord Herschell did not rely, as strongly as Lindley, J., did, upon the fact that the workman complained of the risk to which he was exposed, and on being told to continue, did so to avoid dismissal. He places his view on another ground. "I think," he said, "that where a servant has been subjected to risk *owing to a breach of duty on the part of his employer*, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, '*volenti non fit injuria*,' which in my opinion has no application to such a case." This would also seem to equally affect cases both where the work is, and where it is not, intrinsically dangerous. But cases might arise, as Lord Herschell shows, where even the employer's negligence might be a risk the workman chose to undertake, as where the particular work, by reason of a defective machine, could not be performed without inevitable injury. If the workman deliberately performs it, he cannot complain of the consequent injury he sustains. It is clear, therefore, that an employer cannot escape liability for the consequences of his negligence or breach of duty which involves injury to his servant, on the ground that, by the application of the maxim, he has consented to run that risk. Nor, if the employer fails in his duty to his servant, can it be said, as an implication of law, that the servant consents to such an act because he

does not refuse to continue in the service. In the present case the jury found as a fact—one by which the House held itself bound—that the plaintiff's injuries were occasioned by the employer's negligence; and to such a state of things the maxim does not apply.

Lord Morris, who, as previously mentioned, saw no evidence of negligence on the defendants' part, but still agreed that he was bound, under the circumstances, to accept the jury's verdict, took the same view. He stated also, that if the defendants had taken the point at the trial that there was no evidence of negligence, they would have been entitled to judgment. Upon the jury's finding, he said: "The appellant may have entered on a risky business; but he did not voluntarily undertake it plus the risk from defective machinery." And again: "How can the plaintiff be held to voluntarily incur a danger from unfit machinery, the unfitness of which he was admittedly unaware of?"

Lord  
Morris's  
view.

Lord Bramwell, the dissentient judge, put his proposition forcibly. The plaintiff was aware that while he was at his work stones were from time to time slung over his head. He knew that was dangerous. He had himself complained of the danger. Yet he worked under these conditions for some time. He was also aware that no warning was given. He knew that was dangerous. How can any one say he did not consent to run the risk? How can any one say he did not appreciate the nature and extent of the danger?

Lord  
Bram-  
well's  
dissenti-  
ent view.

Here Lord Bramwell treated the point of consent as an inference of fact, as Bowen, L.J., had done in *Thomas v. Quartermaine*. But in order to put the matter in this way, Lord Bramwell had to set aside the findings of the jury. This he did, and declined to hold that the Court was bound by them. If his lordship had felt himself so bound, he would probably not have been in disagreement with the other judgments. "I admit," he said, "that personal negligence in the master would make him liable;

so also the use of dangerous plant not known to the servant." His dissent, therefore, seemed to arise upon his disagreement as to the proposition before the Court; and with much elaboration he argued out a question which, in the opinion of the other law lords, was not the question before them.

Legal  
maxims.

As regards the use and reasonableness of resorting to legal maxims, the attitude of mind of two eminent judges is curiously at variance. Lord Esher in *Yarmouth v. France*, 19 Q.B.D. at p. 653, expressed his detestation of "the attempt to fetter the law by maxims. They are almost invariably misleading; they are, for the most part, so large and general in their language that they always include something which really is not intended to be included in them." While Lord Bramwell, in *Smith v. Baker* (1891), A.C. at p. 344, dealing with the same maxim (*volenti non fit injuria*), repudiates the notion that maxims are to be discarded. "If this is a maxim, is it any the worse? What are maxims but the expression of that which good sense has made a rule?" But whether a maxim is to be regarded as a formula and nothing more, or as a summarized statement containing the quintessence of legal learning, the question of its application to the particular facts of a case is of equal difficulty. The question whether the words of an Act of Parliament apply, presents precisely the same difficulty. Presuming a maxim to be a doctrine accepted by the common-law, you can hardly be said to "fetter the law" by applying it, unless you apply it wrongly. But as it is now held that the maxim involves no implication of law, the force of any objection to its application probably disappears.

The  
maxim  
also  
applies  
where no  
relation-  
ship of

There are many cases, too, dealing with the application of the maxim where the relationship of master and servant is not involved. It will be sufficient to refer to one or two. *Thrussell v. Handyside*, 20 Q.B.D. 359 (in which *Woodley v. Metropolitan District Ry.*, 2 Ex. D. 384, was distinguished),

was the case of a workman, the plaintiff, who was told by his employers to work in a particular place. The defendants were contractors, who were working above that place; and their work was dangerous to those working below, unless proper precautions were taken. The plaintiff was aware of the danger. The jury found the defendants guilty of negligence in not taking proper precautions for the safety of those who were working below; that there was no contributory negligence by the plaintiff; and that he had not voluntarily incurred the risk. It was held that the case had been rightly left to the jury. Although the plaintiff was aware of the danger, it was a question of fact for them whether, under the circumstances, the plaintiff had voluntarily undertaken the risk; and their finding was justified by the fact, that the plaintiff could not have avoided the danger of working where he was, unless he had disobeyed his employers and incurred the risk of dismissal.

In *Woodley v. Metropolitan District Ry. (ante, p. 199)*, a workman in the employ of a contractor engaged by the defendants, had to work in a dark tunnel, rendered dangerous by passing trains. After working there a fortnight, he was injured by a passing train. The jury found that the defendants, in not taking any precautions for the protection of the plaintiff, had been guilty of negligence. The majority of the Court, reversing the decision of the Court of Exchequer, held that the plaintiff, having continued in his employment with full knowledge of the danger, could not make the defendants liable for an injury arising from danger to which he had voluntarily exposed himself. On the other hand, Mellish and Baggallay, L.JJ., dissented, and held that the plaintiff, as servant to the contractor and not to the defendants, had entered into no contract with the latter which would modify the ordinary duty of those who carry on a dangerous business to take reasonable precaution that no one should suffer personal injury from the manner in which it is conducted; and that

no such contract could be inferred from the plaintiff remaining in his employment. The judges who decided *Thruswell's case* considered that the facts of that case distinguished it from *Woodley's case*. In view of the later decisions, it would seem that the opinion of the two dissentient judges in *Woodley's case* would now prevail.

In *Osborne v. L. & N.W. Ry.*, 21 Q.B.D. 220, the plaintiff was injured by falling on steps leading to the defendants' railway, which were slippery and dangerous by the defendants' fault. There was no contributory negligence by the plaintiff, but there were other steps which he might have used, and he admitted that he knew the steps were dangerous, and went down carefully holding the handrail. This admission was seized on by the defendants in order to put forward the maxim *volenti non fit injuria* as a defence. It was held that the defendants had not shown that the plaintiff voluntarily agreed to incur the risk, knowing its nature and extent; and that the plaintiff was therefore entitled to recover. The existence of negligence on the defendants' part had been found as a fact, so also had the absence of contributory negligence by the plaintiff; but there was no finding of fact that the plaintiff knew and appreciated the risk, and agreed to undertake it. Unless that had been found as a fact, the defendants were not in a position to successfully contend that the maxim applied.

## CHAPTER XVII.

### *Liability to trespassers.*

IN *Lynch v. Nurdin*, 10 L.J.Q.B. 73 (*see ante*, p. 27), the successful plaintiff, who was a child, was a trespasser when he met with his injury; and it was subsequently said by Parke, B., in *Lygo v. Newbold*, 23 L.J. Ex. 108, that the ground of that decision was, that the plaintiff had taken as much care as was to be expected from a child of tender years: "in short, that the plaintiff was blameless, and consequently that his act did not affect the question." The child was undoubtedly a trespasser in getting into the cart, in the sense that he had no business to be in it; and the accident, presumably, would not have occurred had he not been in the cart. The ground on which Lord Denman based his judgment was thus stated by him: "Can the plaintiff, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, *that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse*, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." The child had acted without prudence or thought, "but had shown these qualities in as great a degree as he could be expected to possess them;" while the defendant had not acted with ordinary care. The child's misconduct, he continued, "bears no proportion to

Where children of tender age are trespassers.

Contributory negligence on the part of children.

*Hughes v. Macfie.*

that of the defendant's which produced it." But it is as impossible to reconcile *Lynch v. Nurdin* with the case of *Hughes v. Macfie*, 33 L.J. Ex. 177 (*ante*, p. 25), as to reconcile this latter case with the opinion expressed by Channell, B., in *Gardner v. Grace*, 1 F. & F. 359 (*ante*, p. 145). Channell, B., in that case laid it down that the doctrine of contributory negligence did not apply to an infant of tender age. In *Hughes v. Macfie* (*supra*) it was subsequently held that this doctrine applied to children just as much as to adults; the judges, who were parties to that decision, being Pollock, C.B., Bramwell and Pigott, BB., and Channell, B., himself. The decision was a strong one. The defendant had taken off the flap or cover of his cellar, and had placed it against a wall in a public street "so that it could easily be pulled over." It is difficult to appreciate how this flap, loosely reared up in a street, could be a less dangerous instrument than a cart left unattended; or to discriminate between the amount of care a child might be expected to exercise in not mounting a cart, and that which should prevent him from playing about a loose flap left in the street. But the defendant was held not liable under the following circumstances. The plaintiff, a child of seven, was playing on and about this flap, and in jumping off it, his dress caught in it, and pulled it over. It fell upon him and injured him. In the judgment it is conceded, that if a person passing along the street had knocked it over upon himself without any carelessness, and sustained injury, the defendant would have been liable.<sup>1</sup> It was urged on the plaintiff's behalf, that to leave a thing of this kind, insecurely fastened, in a public street, was an act of negligence, and that the facts were within *Lynch v. Nurdin* (*supra*). The Court did not accede to this.

<sup>1</sup> So, also, if it had fallen on a passer-by and injured him in consequence of another person meddling with it: *Daniels v. Potter*, 4 C. & P. 262.

"Had he been an adult, it is clear he could maintain no action; he would voluntarily have meddled, for no lawful purpose, with that which, if left alone, would not have hurt him; he would therefore have contributed by his own negligence to his damage. We think the fact of the plaintiff being an infant of tender years makes no difference." *Mangan v. Atterton*, L.R. 1 Ex. 239 (discussed *Mangan v. Atterton*, ante, p. 25), was a similar case to this, the child of four, who put his hands into an oil-cake crushing machine left unprotected in a street, being held to be a trespasser, and as such, disentitled to recover damages. But, as already noticed (ante, p. 25), Cockburn, C.J., and Manisty, J., in *Clark v. Chambers*, 3 Q.B.D. 327 (ante, p. 25), doubted the correctness of this decision, both as regards the finding that there was no negligence on the defendant's part, or, if any, that it was too remote; and also that the plaintiff was precluded from recovering because he was a trespasser; saying that the decision was "obviously in conflict" with other cases. In *Singleton v. Eastern Counties Ry.*, 7 C.B., N.S. 287, where a little girl of three years was trespassing on a railway, and was injured by a passing train, the child did not succeed in recovering damages on the ground, chiefly, that the defendants had not been guilty of any negligence. The question, therefore, whether a child of tender years can recover damages when he is a trespasser is left in an unsettled condition. *Harrold v. Watney*, 1898, 2 Q.B. 320, was another case of an infant plaintiff. The defendant owned a fence abutting on a highway, and this fence was in a rotten and insecure condition. The plaintiff, a child of four years, put his foot on it, and it fell on and injured him. The Court of Appeal decided that the plaintiff could maintain an action; but the decision went in part upon the ground, that a fence in such a condition close to the highway was a nuisance. A. L. Smith, L.J., however, rested his judgment strongly on the authority of *Lynch v. Nurdin*, a case which he said



"has never been overruled, but has been treated in subsequent cases as sound law;" notwithstanding that *Hughes v. Macfie* did not give effect to it; and he also relied on *Jewson v. Gatti*, 2 Times L. R. 381, 441 (*ante*, p. 28), where a child recovered damages who leant up against a bar placed across a cellar in a highway, attracted by scene-painting which was going on in the cellar. The bar gave way, and the child fell into the cellar. Rigby, L.J., appeared to rely entirely on those two cases; but Vaughan-Williams, L.J., founded his judgment altogether on the point that the rotten fence constituted a nuisance in the highway; and commenting later [in *McDowall v. G.W. Ry.*, 1903, 2 K.B. 331 (*ante*, p. 31)] upon his judgment, he said that the case was just on the border-line, and that he would not have concurred in the judgment of the Court, except on the ground of nuisance.

There is a distinction between trespass and contributory negligence.

In such cases as *Lynch v. Nurdin*, *Hughes v. Macfie* (*ante*, p. 212), and *Mangan v. Atterton* (*ante*, p. 213), it is difficult to distinguish between an act of trespass, and an act of negligence supposed to constitute contributory negligence; the act of trespass having led directly to the injury. The legal position of a trespasser becomes, perhaps inevitably, mixed up with the legal notion of contributory negligence. The two things, however, are not the same. You may be a trespasser unwittingly;<sup>1</sup> and you cannot commit a trespass by any act of omission.<sup>2</sup> If I go on lands where I have no right to be, I am none the less a trespasser, though I did not know I was trespassing. And, in the absence of other considerations, there is no duty on the owner of the land towards me to keep it in such a state that it would not be dangerous for me to come upon it. But you cannot be guilty of negligence unwittingly; nor can you be free from liability for negligence because

<sup>1</sup> *Basely v. Clarkson*, 3 Lev. 37.

<sup>2</sup> *Shapcott v. Mugford*, 1 Ld. Raym. 187; *Lawrence v. Oboe*, 1 Stark. 22.

you have merely omitted to do what it is your duty to do. A breach of duty involves some conscious act. You are, in the legal sense, taken to be aware of what your duty is, and to neglect its performance is a deliberate act. Whether the negligent act is one of omission or of commission, each is equally a conscious breach of duty. In the former case, you omit to carry out what you are bound to perform; in the latter, you omit to abstain from doing what you are bound not to do. In both cases you are actively negligent.

In the cases of trespass by children of tender years where dangerous things are negligently left in a street; as where a child of four put his fingers into a dangerous machine, *Mangan v. Atterton* (*supra*) definitely decided that the child could not sustain an action, on the ground that he was a trespasser. Whether under such circumstances a child can be said to be a trespasser is, perhaps, still open to discussion. But if he be a trespasser, it would probably be on the ground that, though the act was unwittingly performed—inasmuch as a child of tender age really knows very little of what he is doing—he is none the less a trespasser. It might perhaps be said that where trespass is set up as a defence, a tangible distinction may exist between the defendant's liability in the case of a child who trespasses on private lands or premises, and in that of one who commits a trespass upon some potentially dangerous article negligently left by the defendant in a public street. But this distinction does not appear to have been taken in any of the decided cases. On the contrary, the trespasses were treated as the same thing in *Hughes v. Macfie*, and the position was used as a *reductio ad absurdum*: if the defendant were liable because the child had meddled with the thing in the street, he would also, it was said, have been liable if the child had meddled with it while inside the defendant's premises.

As to whether, on the other hand, a child of tender age can be guilty of contributory negligence, so as to prevent

him from maintaining an action for negligence, there is, as we have seen, a discrepancy of judicial opinion. Lord Fitzgerald defined contributory negligence (see *Wakelin's case*, p. 129) as an absence of the ordinary care "a sentient being" ought reasonably to take in avoiding injury to himself; and the context shows that he meant by "a sentient being," one who has the ordinary powers of perception—a responsible person. Is it reasonable that it should be assumed, contrary to the nature of things, that a child of tender age has acquired the power of taking the care of itself, which "a sentient being" is ordinarily expected to possess? If it really be at common-law, that such a child is to be taken as bound to exercise the conscious act of duty, the breach of which constitutes negligence, in the same way as adults are (*Hughes v. Macfie*), it would seem that the Infants' Protection Act should be extended in another direction, so as to prevent a shock to our common sense. "You have no right," said James, L.J., in *The Bywell Castle*, 4 P.D. 219, "to expect men to be something more than ordinary men." But children, it would seem, must always be expected to be something more than ordinary children.

Limits of  
"tender  
age" un-  
defined.

What the limits of "a tender age" may be, no one has ever attempted to define. But it is a curious fact that the child "of tender age" in *Mangan v. Atterton* (*ante*, p. 213), whose trespass precluded him from recovering, was a child of four years old; while the successful plaintiff in *Lynch v. Nurdin* (*ante*, p. 211), whose trespass did not preclude him from recovering, was seven years of age.

Legal  
position  
of adult  
trespasser.

But a trespasser who is an adult, cannot as a general rule recover damages. If, however, the defendant has done an inhuman or an unlawful act, such as setting a spring gun, then, although the trespasser be by his own act the immediate cause of the injury he sustains, he can maintain an action.<sup>1</sup> The view of the law seems to be that, no duty

<sup>1</sup> *Bird v. Holbrook*, 6 L.J.C.P. 146; *Ilott v. Wilkes*, 3 B. & A. 304;

is owed to a trespasser;<sup>1</sup> but there is a duty owed to all the world not to do something unlawful, or inhumanly cruel. When, however, it is said that no duty is owed to a trespasser, this only means that there is no such duty towards him to prevent consequential injury happening, as would be owed to one who is not a trespasser. It does not mean that you have no duties to him at all, merely because he is a trespasser; and therefore if you go out of your way to inflict injury upon him deliberately, you would be liable. But this liability would be in respect of an action for assault, and not for negligence.

In the cases where a plaintiff has succeeded, notwithstanding that he was a trespasser, circumstances were present which made the trespass immaterial. Thus, in *Barnes v. Wood*, 19 L.J.C.P. 195, although the plaintiff was strictly a trespasser upon the hole in the defendant's area into which he fell, yet the trespass (a merely technical one) was brought about by the negligence of the defendant himself, who had made the footway dangerous, so that people walking lawfully along it were liable, without negligence, to tumble into the hole, which abutted on to the footway. The plea of trespass there did not avail him. In *Lynch v. Nurdin*, 10 L.J.Q.B. 73 (*ante*, p. 27), the plaintiff was a child of tender age who had climbed into a cart negligently left by the defendant in a public street; and though a trespasser in the cart, "his action did not affect the question."<sup>2</sup> In *Bird v. Holbrook* (*supra*) the defendant had committed an unlawful act, which he purposely concealed the better to enable him to catch thieves, and he was held liable to the plaintiff for an injury arising out of the unlawful act; though the

*Jordin v. Crump*, 11 L.J. Ex. 74; *Barnes v. Wood*, 19 L.J.C.P. 195; *Hounsell v. Smith*, 29 L.J.C.P. 203.

<sup>1</sup> *Degg v. Midland Ry.* (*per* Bramwell, B.), 1 H. & N. 773; *Batchelor v. Fortescue* (*per* M.R. & Smith, J.), 11 Q.B.D. 474 (*ante*, p. 56).

<sup>2</sup> *Lygo v. Newbold* (*ante*, p. 211).

plaintiff had trespassed by climbing over the garden wall. And in *Jordin v. Crump* (p. 217), where an adult trespasser was held not to be entitled to recover, the approval of the Court was given to *Bird v. Holbrook* (p. 216) only on the ground that the defendant's act had been an unlawful one; and if the act were not an unlawful one, the Court intimated that they would not have agreed with that decision. On the other hand, there are numerous cases where, in the absence of any particular circumstances such as those above mentioned, the act of trespass has been held to deprive the plaintiff of a right of action.<sup>1</sup>

It must, however, be borne in mind that a negligent defendant cannot escape liability to a plaintiff because the action of a third party, who is a trespasser, sets in motion the injury which the plaintiff sustains.<sup>2</sup>

<sup>1</sup> *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes* (*ante*, p. 216); *Jordin v. Crump* (*supra*); *Degg v. Midland Ry.* (*ante*, p. 217).

<sup>2</sup> See the cases collected in *Clarke v. Chambers*, 3 Q.B.D. 327 (*ante*, p. 24).

## PART II.

*DUTIES OUT OF THE ORDINARY.*



## CHAPTER XVIII.

### *Bailees.*

WHERE negligence arises out of the non-performance of such duties as all reasonable persons are required to perform, or out of acts such as all prudent persons would not perform, the duties may be classified under the head of Ordinary Duties. But where certain duties arise out of special conditions not applicable to all men, such as the duties imposed on bailees, on carriers, on skilled persons and others, in carrying out their avocations, such duties may be classified under the general head of Special Duties, or Duties out of the Ordinary.

Under this general head, it is proposed to deal particularly with the law as regards the negligence of persons occupying such positions.

The various kinds of bailment, and the different "degrees" of negligence applicable to them, are all set out in the celebrated judgment of Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L.C., 11th ed., p. 173. Reference has already been made to the distinctions in the various "degrees" of negligence, and to the views taken by some of the modern authorities as to their usefulness, or even their practicability.<sup>1</sup>

We shall endeavour to discover the duties imposed on bailees, the neglect of which would make them liable for negligence. The subject divides itself into the duties of gratuitous bailees, and of bailees for reward.

<sup>1</sup> See the question discussed, *ante*, p. 15, *et seq.*



It can be well understood that a person who, without any payment, and for my convenience, takes charge of my goods, should be deemed to have a less onerous burden cast on him in safeguarding them, than is imposed on one to whom I lend my goods gratuitously for his convenience. The difference of liability in the two cases has been expressed as excusing the gratuitous bailee, with whom something is deposited for my convenience, from acts of "slight negligence," holding him liable for "gross negligence" only; while a bailee to whom I lend something for his own convenience, is liable in respect of both these "degrees" of negligence. It will, however, be seen that in practice there is but a small difference between the responsibilities of these two classes of bailees; that a common standard of reasonable precaution is imposed on both; and that while the duty of the former kind of bailee is expressed as that of taking the same care of the thing bailed as he does of his own goods, in effect the duty imposed on both classes is to exercise that reasonable amount of care which common prudence demands.

The  
deposit.

A bailment where the care or custody of goods is accepted by the bailee gratuitously for the convenience of the bailor, the thing bailed to be returned when the bailor asks for it, is the kind of bailment called a deposit—*depositum*. If we examine what duties are imposed on the depositary, we shall be better able to understand his position, than by referring to his liability as granting immunity for "slight negligence." The duty he owes me is, as already stated, to bestow the same care upon the custody of goods so bailed as he gives to that of his own property. We shall see shortly what this means; but he is not bound to do anything more than this. If he fails to do it, whether by giving less care to the thing bailed than he gives to his own things, or by exposing the bailment to risks and dangers to which his own goods are not subjected—which is much the same thing as being less careful of them—he is liable in

damages for his negligent treatment, if any damage thereby accrues. This is said to be "gross negligence," in distinction to "slight negligence," for which he is not liable. Lord Holt's celebrated judgment, as already remarked, allocates to various bailments the "degrees" of negligence for which different classes of bailees are liable. Many eminent writers would seem so to treat "degrees" of negligence, as to make it appear that this classification is essential to the proper understanding of the law of bailments. Yet, to say that a gratuitous bailee is only liable for "gross negligence" conveys, having regard to the nebulousness of the expression, no definite idea of the measure of his liability. The notion that the duty is to treat the bailment as well as you would treat your own property is, however, one which can be readily grasped. But it leaves open the question, what care ought a man to bestow upon the keeping of his own goods, which is to be the standard of care according to which the bailor's things are to be kept? The answer is, that he ought to take such care of his own property as reasonable people are ordinarily in the habit of taking; and whether he has, or has not, done so is a question of fact ascertainable upon the resort to common experience. The rule, therefore, resolves itself into the statement, that the depositary must take, not the same care he actually takes of his own property of a similar kind, but such care as any reasonable person ought to give to its safe-keeping. The care which is expressed as being the same care the bailee would take of his own property, does not set up any special standard of carefulness, or carelessness, peculiar to the individual. It means that his duty is to exercise the care all reasonable persons are in the habit of bestowing upon their own property of a similar kind; and the bailor has no right to expect the bailee to take any unusual precautions. No doubt special cases may arise where the standard of care is one applicable to the individual bailee only. When I ask a man who is notoriously slovenly, or one whom I

Taking the same care of the bailment as you do of your own things, imposes a standard of reasonable prudence.

know to be incapable of taking proper care of his own things, to gratuitously take care of mine, I cannot exact from him a greater measure of carefulness than I know him to possess, and upon which I have chosen to rely, even though his carelessness is greater than is admissible according to the ordinary standard of care.

On the other hand, though he treats the thing bailed and his own property in the same way, it may be negligence in him to treat mine in this way, and he may be liable to me if damage arises. Thus Blackstone [2 Comm. 453]: "He (the gratuitous bailee) must observe a reasonable degree of care, as in other cases, with reference to the nature of the goods and the particular circumstances of the bailment; as where one sent his horse to another to keep as a mere gratuitous bailee, and he turned the horse, after dark, into a dangerous pasture to which it was unaccustomed; though the place would be perfectly safe to his own cattle, to this animal it would be otherwise, and the bailee would be responsible for any injury happening in consequence." It will be observed that this instance is only another illustration of the rule which obliges the bailee to take the same reasonable care as he would of his own property of a similar nature, though literally it appears to operate differently; because the supposition is, that the bailee would not have turned a strange animal of his own into this pasture, if he had been reasonably careful.

It is immaterial, therefore, to inquire how the bailee kept his own goods; he is bound to exercise ordinary prudence as regards the custody of the bailment, however negligent he may be in guarding his own property.<sup>1</sup> But upon inquiring as a fact whether he has exercised that care, it may be useful to ascertain what care he bestowed on his own things.

Though a man cannot excuse his carelessness, with regard to the custody of the thing bailed, by setting up that

<sup>1</sup> *Doorman v. Jenkins*, 2 A. & E. 258.

he was equally careless of his own property, yet he may impose upon himself a standard of carefulness with respect to his own goods, to which he must conform in safeguarding those of his bailor. If a watchmaker loses my watch owing to its having been stolen, and he did not put it in as safe a place as that in which he kept his own watches, he would be liable; although the place where my watch was put would otherwise have been probably regarded as a reasonably safe one.<sup>1</sup>

A gratuitous bailee is not liable if the thing bailed is stolen from him without any carelessness on his part; and it would seem also from *Coggs v. Bernard*, that the fact of the theft having occurred, raises no presumption of negligence, as Sir W. Jones in his famous essay thought it did.<sup>2</sup>

Cases of deposit often occur amongst bankers, who receive, without payment, a box or parcel from a customer of the bank to be taken care of. The position of the bankers in such a case, and their liabilities, were discussed in the case of *Giblin v. McMullen*, L.R. 2 P.C. 317. A customer of the Union Bank of Australia entrusted a box containing securities to the bank for safe-keeping, and he kept the key of the box. The locked box was placed in a strong-room with other boxes belonging to customers, besides specie and securities belonging to the bank. The strong-room was in all respects properly equipped, and was guarded day and night. The owner of the box had access to it during banking-hours, and when he wished to examine it he was attended by one of the bank-clerks. Once, while he was going over his box, the clerk who attended him abstracted some securities from it, and made away with them. In an action brought by the executor of the customer, it was held that the bank, as gratuitous bailees,

<sup>1</sup> *Clarke v. Earnshaw*, Gow. 30. And see Jones on Bailments, 4th ed., p. 62.

<sup>2</sup> See Story on Bailments, 9th ed., secs. 38, 39.

were not bound to exercise more than ordinary care of the things deposited with them; and they could only have been made liable if they had failed to exercise the ordinary diligence of a reasonably prudent man as to his own property of a similar nature. The defendants were accordingly held not to be liable. If, for instance, they had employed a clerk about the bank who was known to them to be dishonest, this would have been exercising less than ordinary prudence, which would have rendered them liable to make good the loss.

The proper care which ought to be bestowed, has reference to the nature of the bailment.

The amount of care which a bailee ought reasonably to give to the safe custody of the thing entrusted to him must depend on the nature and value of the thing. For instance, jewellery and precious stones naturally demand a more vigilant and a stronger guarding, than things of little value; and it is impossible to lay down any hard and fast rule as to the amount of care to be exercised in all cases. The law recognizes this impossibility, and does not seek, as a matter of law, to define what is ordinary prudence in all cases. It is for the jury, as men of common experience, to decide as a fact, whether such care has been exercised, under the circumstances before them, as ordinary prudence demands. But the judge first explains to them the principles upon which the law depends; and if the facts disclose no evidence of negligence upon which a jury ought reasonably to find the defendant negligent, or there is nothing more than "a mere scintilla" of evidence, the judge withholds the case from the jury.<sup>1</sup>

Misuse of bailment by bailee.

The bailee will also be liable as for negligence, when he makes use of the thing deposited when he was not intended to use it, and any damage happens to it; or if he uses it for other purposes than those for which he was permitted to use it; and this is strictly enforced against a borrower.

<sup>1</sup> *Doorman v. Jenkins* (ante, p. 224); *Ryder v. Woombwell*, L.R. 4 Ex. 32; *Bridges v. N.L. Ry.*, L.R. 7 H.L. 213; *Jackson v. Metropolitan Ry.*, 3 App. Cas. 193.

The gratuitous bailee may also, in certain circumstances, have imposed upon him a greater measure of care than a person is ordinarily expected to display. If he is a skilled person, and he undertakes to do something in respect of the bailment, which involves the exercise of his skill, he is bound to do it to the best of his skill; and if he omits to apply that skill he would be liable for any damage.<sup>1</sup> Thus, under different circumstances, a heavier burden of liability is imposed on one gratuitous bailee, than on another. In the same way, a doctor gratuitously attending a patient would be liable for negligence if he did not use proper professional skill in treating him; while an unskilled person, who, in an emergency, did what he could for some one who had met with an accident, would not be liable, because he did something, which the possession of professional skill would have taught him he ought not to have done.

Another kind of gratuitous bailment is that where the bailee alone benefits; as where I lend anything, animate or inanimate, to a friend for his use, he having to return the thing lent, and not an equivalent. This is the bailment called *commodatum*. In this bailment, the bailee is required to exercise all reasonable care in protecting the thing lent to him; and while, in the case of a deposit, the bailee is said not to be responsible for "slight negligence," the difference of the moral obligation in *commodatum* is intended to be pointed to, by saying that the borrower is liable for "slight negligence." But this distinction is probably merely one of nomenclature; the substantial duty imposed upon him is to expend all the care and prudence a man can reasonably be called upon to exert. If he fails to do this, and further, if he abuses the use of the thing lent to him, or uses it for other purposes than those for which it was lent, and damage ensues, he is guilty of negligence. In point of fact, the same duty is imposed on a depositary;

<sup>1</sup> *Wilson v. Brett*, 11 M. & W. 113; and see *post*, p. 230.

though the disposition would be, to exact a more rigorous discharge of that duty from a bailee to whom something is lent. In one of the old cases in the books the exactness with which this duty is to be discharged is exemplified. A horse was lent to a friend in order that he might ride it. He allowed his servants to ride it; and this was held to be an abuse of the purpose for which the horse was lent.<sup>1</sup>

If one lady lends another her diamonds to wear at a ball, and to be returned the next day; if it is said that, being liable for "slight negligence," she must take extraordinary care of them to prevent them from being lost, it is difficult to conceive what she is called upon to do, beyond exercising those precautions which prudence dictates; that is, taking such care of them as reasonable persons would take of diamonds, and as the owner would herself reasonably take. On the other hand, it is as difficult to conceive what less degree of care is required either from her or from the bailee with whom a thing is deposited; who is also bound to give the same care as reasonable persons would give. It is as difficult to formulate in the mind what "slight negligence" is as distinct from "gross negligence," as it is to distinguish between "negligence" simply, and any of its "degrees." When it is said, therefore, that a depositary is not liable for "slight negligence," but only for "gross negligence," what seems really to be meant, when these terms come to be practically applied, is nothing more than that he must act prudently in the circumstances, and if he does not, he is liable for any loss that has been sustained. This is also in practice found to be very much the position of the borrower of a thing.

What is  
prudent  
and  
imprudent  
must  
depend  
on sur-

Whether an act is prudent or imprudent must necessarily depend upon the surrounding circumstances. A practical distinction between an imprudent act amounting to negligence, and one which could not be so characterized, although loss arose in consequence of its having been taken, is well

<sup>1</sup> *Bringloe v. Morrice*, 1 Mod. 210.

illustrated in an American case<sup>1</sup> cited in Story on Bailments, 9th ed., sec. 185; where the two acts are brought into juxtaposition. A, undertook to carry two bags of doubloons for B, gratuitously, from New York to Boston by steamer. The boat was to sail early in the morning, and on the previous evening A, put both bags of doubloons into his valise, together with money of his own. He placed this valise in a berth in an open cabin, and he was told by the steward that it was not safe to leave it there. Notwithstanding that warning, he went away in the evening, leaving the valise where he had put it, returned late the same evening, and slept in another cabin than that in which he had placed his valise. The next morning, just as the boat was leaving the quay, he opened his valise, and found one of the bags was missing. He immediately gave an alarm; and running up hastily from the cabin with the object of stopping the boat, he left his valise open in the cabin, with the remaining bag of doubloons in it. After only a minute's absence he returned to the cabin, and found this bag also missing. The bailor brought an action against A, for the loss of both bags, and the question left to the jury was, whether there had not been "gross negligence" on A's part, although he had also put his own money in the valise. The judge directed the jury to consider whether A, had used the diligence a gratuitous bailee ought to use under the circumstances. The jury found a verdict for the plaintiff for the first bag lost; and for the defendant in respect of the loss of the second bag, and the findings were held to be justified. Here, the act of putting his valise containing coin in a place where he was told it was not safe to leave it, and then leaving it alone there, was to do something which an ordinarily prudent man would not have done; nor was the act rendered any the less imprudent because the defendant treated his own money in precisely the same way. But on discovering the loss of the first bag,

rounding  
circum-  
stances.

<sup>1</sup> *Tracy v. Wood*, 3 MASON. 132.



it could not be said, that the hurried action he then took in endeavouring to retrieve the loss was an unreasonable thing to do under the circumstances; or was one which common experience showed a reasonably cautious person would not have done. These distinctions cannot, indeed, be further defined by the law than by the direction, that the bailee must act with reasonable care and prudence. Whether he has, in fact, done so, under the particular circumstances of the case, must necessarily be left to the jury to determine as a fact.

*Mandatum*:  
a skilled  
person  
impliedly  
under-  
takes to  
exercise  
his skill.

The species of bailment known as the mandate [*Mandatum*], where a thing is delivered to the bailee in order that he should do something to it, and perform this gratuitously, confers, in effect, the same duty on the bailee as in the case of a deposit. The circumstance that when such a bailee is a skilled person he must exercise his skill in doing what he has undertaken to do, and if he fails to bring his skill to bear, he is guilty of negligence; is not so much a difference of liability upon him, as an extra liability arising from the fact that, being a skilled person, he undertakes, either expressly or impliedly, to exercise the particular skill he possesses.

*Wilson v. Brett* (*ante*, p. 227) was such a case. The defendant gratuitously undertook to ride the owner's horse for the purpose of exhibiting him for sale; and as the defendant was shown to be a person conversant with horses, he was held bound to use the skill to be expected from such persons. Not to do so is, under the circumstances, to be guilty of negligence.

Involun-  
tary  
bailees.

Circumstances sometimes arise under which a man becomes an involuntary bailee of goods delivered to him, for a purpose which cannot be finally completed. In such a position, it is his duty to act with reasonable care and caution in respect to the goods; and he should be careful not to do any act in reference to them which his possession of the goods gives him no authority to do, or which necessity

does not justify; or he may render himself liable as for a conversion of the goods.<sup>1</sup>

A bailee for hire is not, generally speaking, liable in respect of thefts by his servants, unless the theft is attributable to any want of due care on his part. An instance of want of due care was afforded in the watch-maker's case (*ante*, p. 225), who took greater care of his own things than of the bailment.

The position of an ordinary bailee for hire does not import any warranty on his part;<sup>2</sup> but, as we saw in *Hyman v. Nye*, 6 Q.B.D. 685 (*ante*, p. 81), a jobmaster who lets out a carriage for hire, impliedly warrants that the carriage is reasonably fit for the purpose of the hiring; and where an accident occurs through any defect in the carriage, the onus is upon him to show, that it could not have been prevented by the exercise of reasonable skill and care on his part.

A livery stable keeper is an ordinary bailee for hire. In *Searle v. Laverick*<sup>3</sup> the plaintiff had placed his carriage with a livery stable keeper, who put it in a shed which had just been erected. The erection of the shed had been entrusted to a competent person as an independent contractor. A high wind blew it down, and the plaintiff's carriage was damaged. The defendant was ignorant of any defect in it; and the judge rejected evidence to show that the shed was unskillfully built, ruled that the defendant was only bound to exercise ordinary care, and that he had done so by employing a competent person to erect it. The plaintiff was non-suited; and the non-suit was upheld in the Queen's Bench.

<sup>1</sup> See *post*, p. 262, *Heugh v. L. & N.W. Ry.*, L.R. 5 Ex. 51; *Hiort v. Bott*, L.R. 9 Ex. 86.

<sup>2</sup> See *Searle v. Laverick*, L.R. 9 Q.B. 122 (*ante*, p. 82).

## CHAPTER XIX.

### *Bailees for hire—Master and Servant—Liability of master for his servant's acts.*

Position  
of bailee  
for hire.

THE bailee for hire is liable for negligence, only when he omits to bestow on the thing bailed, or upon its treatment, the diligence all prudent persons use in safeguarding goods of the particular kind bailed. The hire of a horse, for instance, entails upon the hirer the duty of using and treating it in a reasonable manner; but if the horse is injured during the bailment, notwithstanding that such care has been exercised, the hirer is not liable to the letter of the horse.

If a horse, while in the hirer's possession, requires skilled veterinary attendance, a man who has no such skill will be acting with a want of ordinary prudence in himself prescribing for the horse; and if the horse suffers injury in consequence of this, the hirer is liable in an action of negligence.<sup>1</sup> If a bailee for hire stores explosive goods so near to the water's edge that they may be damaged by flood-water, and they are so damaged, this is negligence. The owner is entitled to rely on his bailee's care and skill.<sup>2</sup>

A bailee for hire, like the gratuitous bailee, is not liable for the theft of the bailment, if the theft is not due to any negligence of his.

There are so many different things included in the term "bailee for hire," that it is convenient to deal more

<sup>1</sup> *Dean v. Keate*, 3 Camp. 4.

<sup>2</sup> *Brabant v. King* (1895), A.C. 632 (*ante*, p. 96).

particularly with their separate instances under various heads; such as warehousemen, carriers and railway companies, jobmasters and others.

In the mean time, as to all bailees for hire, they are responsible to strangers, not only for their own defaults, but also for those of their servants, provided that the negligent or imprudent act has been done by the servant in the course of his employment, or within its scope.

The responsibility of the bailee for his servant's acts, as between himself and his bailor, rests on other grounds.<sup>1</sup>

A servant may be acting in the course of his employment, and yet in disobedience to his master's orders, and the master will still be responsible. If this were not so, whenever a servant acting in his master's service, disobeys some instruction of his master and injures some one while doing so, the injured person would have no remedy against the master. It must be assumed that no master in general authorizes his servants to be negligent, or to disobey him; and if these circumstances excused the master from liability, a person injured by a railway company's servants, for instance, where the accident arose out of the servants' disobedience, would have no action against the company.

Where an omnibus driver in the employ of the London General Omnibus Company, deliberately drew his omnibus in front of a rival omnibus and injured it, the company were held liable for the act of their servant, although his orders prohibited him from doing this. The direction to the jury (which was approved in the Exchequer Chamber) was, that if the driver, being irritated, acted carelessly, recklessly, wantonly, or improperly, but in the course of his employment, and believing that what he was doing was in the interest of his masters, the company were liable. But that if the driver's act was an act of his own, to effect a purpose of his own, the company would not be responsible.<sup>2</sup>

<sup>1</sup> See *Coupé Co. v. Maddick*, post, p. 237.

<sup>2</sup> *Limpus v. L.G.O. Co.*, 32 L.J. Ex. 34.

No doubt, an inquiry of that sort, which makes it necessary to dive into a man's mind, so to speak, in order to ascertain what his intentions were, is a delicate and difficult one. It seems, however, to be the only means of discovering, in such a case, whether he was acting in the course of his employment when the accident occurred.

"Course of employment" and "scope of authority" mean the same thing.

The law declares that a master is responsible for the acts of his servant, when that servant is acting "in the course of his employment," or "within the scope of his employment." Both these expressions mean the same thing.<sup>1</sup> He is also liable for his servant's wilful and malicious acts, if the servant was at the time acting in the course of his employment, but not if he was not so acting.<sup>2</sup>

It makes no difference to the master's liability that the servant's act was a criminal offence, if at the time of its committal the servant was acting within the scope of his employment.<sup>3</sup> Where, therefore, a servant, while so engaged, assaulted the plaintiff, the master was held liable. Nor was the master exempt because the plaintiff had already convicted the servant for the assault, who had been fined, and had paid the fine; the release of the servant from civil liability after conviction for the assault, by virtue of 24 & 25 Vict. c. 100, s. 45, applying only to the person charged.<sup>4</sup>

*Coppen v. Moore* (1898), 2 Q.B. 306, shows that under the Merchandise Marks Act, 1887, something done by a servant in contravention of the Act, when done within the scope of his employment, may make the master criminally liable. (And see as to partners, *Hamlyn v. Houston* (1903), 1 K.B. 81.)

Test as to whether a servant is

Much contention arose on this point, as to when a servant is or is not acting in the course, or within the scope,

<sup>1</sup> *Per* Rigby, L.J., *Dyer v. Munday* (1895), 1 Q.B. 742 at p. 748.

<sup>2</sup> *McManus v. Crickett*, 1 East. 106.

<sup>3</sup> *Dyer v. Munday* (*supra*); *Bayley v. M.S.L. Ry.*, L.R. 8 C.P. 118; *Seymour v. Greenwood*, 30 L.J. Ex. 189, 327.

of his employment. It had been held, that where a servant acting for his master. having driven his master out, and after setting him down, was directed to drive back to a certain place, but, instead of doing so, drove to another place to deliver a parcel of his own, and on returning thence injured a person, that the master was liable. Erskine, J., was of opinion that where the servant is entrusted with the control of the horse and carriage the master is responsible.<sup>1</sup> But that case has been overruled in *Storey v. Ashton*, L.R. 4 Q.B. 476, where the true test was said to be, not that laid down by Erskine, J., but, that the master is only responsible so long as the servant can be said to be doing the act (in the doing of which he is guilty of negligence) in the course of his employment as a servant. When he goes off on his own business, as he did in *Sleath v. Wilson* and in *Storey v. Ashton*, he ceases to be acting in the course of his employment.

But where the servant merely carries out his orders in a roundabout way, this deviation does not necessarily exonerate the master. "If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable," said Parke, B.<sup>2</sup> And again, "If the servant, being on his master's business, took a detour to call upon a friend, the master will be responsible."<sup>2</sup>

A servant may still be on his master's business so as to render him liable, though he deviates from his master's orders.

The question, then, is one of degree. Whether the deviation is of such an extent as to make it a new journey, and not one undertaken in the course of his employment, must be determined according to the circumstances; but in *Storey v. Ashton* the servant started on a separate journey which had nothing to do with his employment.

In *Rayner v. Mitchell*, 2 C.P.D. 357, the defendant's A journey started on the carman also started off with his master's horse and cart

<sup>1</sup> *Sleath v. Wilson*, 9 C. & P. 607, 612.

<sup>2</sup> *Joel v. Morrison*, 6 C. & P. 501; and see *Whatman v. Pearson*, L.R. 3 C.P. 422.

servant's business alone, is not converted into one on his master's business, by mere pretence of performing a duty for the master.

entirely for a purpose of his own, and without his master's permission; but on the return journey, during which he negligently ran into the plaintiff's cab, he carried out some portion of the duties he was employed to perform, *i.e.* collected two empty casks belonging to his master (the defendant), in order to return them to the defendant's brewery. The question was, whether under these circumstances, although the carman originally started on business of his own, and not in the course of his employment, he had, at the time of the accident, re-entered upon his ordinary duties, by picking up these empty casks, so as to make the master liable. It was held that he had not resumed his employment by doing this. He had started out for his own purposes, and if the accident had occurred on this journey without his having picked up a cask or two, the master would clearly not have been liable, according to the decisions already noticed. That journey, which was not taken in the course of his employment, could not be converted into a journey on his master's business "by the mere fact," as Lindley, J., put it, "of the man making a pretence of duty by stopping on his way." The other learned judge who took part in the decision (Coleridge, C.J.) merely remarked, in stating the circumstances, that in substance and good sense, it could not be said that the carman had re-entered upon his ordinary duties. Cases such as these, however, which are mixed questions of law and fact, must be determined according to their particular facts; and circumstances can be conceived where a journey, originally started not on the master's business, could on the return journey, or at some time during the journey, be converted into one undertaken in the course of the servant's employment.

*Burns v. Poulson.*

The difficulty of deciding, as a matter of fact, whether a servant is acting within his employment, is shown by the case of *Burns v. Poulson*, L.R. 8 C.P. 563, where the judges disagreed; the majority holding that the act of the

servant was within his employment, and Brett, J., taking a contrary view. A stevedore employed to ship iron rails, had a foreman who was assisted by labourers. The foreman's duty was to carry the rails to the ship after the carman had brought them to the quay and unloaded them there. The carman not unloading the rails as the foreman wished, the foreman himself got into the cart and unloaded them; and throwing them out negligently, hurt the plaintiff, who was passing by. Brett, J., said that as the foreman's duty or employment only began after the rails were unloaded, it was no part of his employment to unload them; and that therefore he was not acting in the course of his employment so as to make the stevedore liable. The majority of the Court declined to take this narrow view of the facts, and held that there was evidence on these facts, from which the jury might reasonably find, that what the foreman did was done in the course of his employment. The question was essentially one of fact, or, more accurately, what inference of fact should be drawn; and it is even more difficult to arrive at unanimity upon points of fact, than upon points of law.

A curious case, where it was held that *Storey v. Ashton* Coupe Co. v. Maddick. (ante, p. 235) had been misapplied by a County Court judge, occurred in the case of *The Coupé Co. v. Maddick* (1891), 2 Q.B. 413, on a point which, it was said, had never before arisen for decision. The defendant hired a horse and carriage from the plaintiff company for a year, and employed his own coachman to drive. Once, after having driven his master out, the servant, instead of taking the horse and coach back to his master's stable, which it was his duty to do, set off on a journey of his own for his own purposes. During the course of that journey, owing to his negligent driving, he injured the coach and the horse. The bailors of the horse and carriage (the plaintiffs) sued the bailee (the defendant) in respect of this injury, as for a breach of the contract of bailment in not taking reasonable



care of the coach and horse. It was held by the County Court judge, on the authority of *Storey v. Ashton*, that the bailee's obligation, so far as his servants were concerned, was limited to acts done by them within the course of their employment, and that as the servant was not so acting at the time of the injury, the bailee was not liable. This decision was overruled, both on consideration of the liabilities and duties of a bailee, and on grounds of general principle for the public benefit. As between a person who might have been injured during that journey, and the servant's master, the master would not have been liable if the servant was not then acting for the master. But as between the bailor of a coach and horse and his bailee, there is an implied condition to return the things bailed in a fair condition; and if they are injured by the negligence of the bailee's servant, to whom he has entrusted them, the bailee is liable for a breach of this implied contract. As pointed out by Cave, J., a person injured, would have a right of action against the servant for his negligence; but the bailor would have no right of action against the servant. Nor could he maintain an action for the conversion of the horse and coach against the servant, because the hirer, and not the letter, was entitled to their possession. The hirer too, unlike the letter, could maintain an action against his servant for his breach of duty, for he owed a duty to his master, but none to the bailee.

It was not the case, as in *Finucane v. Small*, 1 Esp. 315, where a hirer was held not to be responsible when his servant had stolen the goods hired. In such case, Cave, J., pointed out, the act of the servant was tortious as against the letter, who had therefore a right of action against the servant. In this case, the servant's act was not tortious as against the letter. Moreover, a bailee is not responsible for the theft of the bailment, unless he has himself been guilty of a want of due care which conduced to the theft.

The decision in *The Coupé Co.'s case* holds that, as between

the bailee and the bailor, the bailee is as much responsible for the negligence of his servant as he would be for his own negligence; and that it does not avail the bailee to say, that having exercised due care in the choice of his servant, he has taken all the care the contract of bailment imposes upon him. It is to be observed, moreover, that if the bailor, having no cause of action against the servant, had also no right of action against his bailee, the bailor, who is the only person really damaged, would have no remedy. Not only could he not compel the bailee to take action against his servant; but if an action for breach of duty were taken by the master against his servant, and he recovered such damages as arose in that connection, and not in respect of the damaged coach, there would seem to be no principle on which the bailor could obtain those damages from the bailee. They would be damages recovered in respect of a breach of duty owed to the bailee; and as the servant owed no duty to the bailor, the bailor could lay no claim to them.

A case of nice distinction was that of *Stevens v. Woodward*, 6 Q.B.D. 318, which well exemplifies the law, that though the mere fact of a servant being prohibited from doing a thing will not exonerate the master, if the doing of the thing occurs incidentally to the servant's employment; yet to make the master responsible, the act of the servant, whether prohibited or not by the master, must be an act connected with or arising out of the work the servant is employed to perform. In that case, a solicitor had a room in his office, in which was a lavatory exclusively for his own use, and his orders to his clerks were that no clerk should go into this room after he had left. A clerk, however, after the defendant had left, went into this room to wash his hands, and negligently left the water-tap turned on. The result was that water escaped into the plaintiff's premises beneath the defendant's office, and damaged them. In an action against the defendant, the question was

The act complained of must arise out of the nature of the employment in order that the master should be liable.

whether what the servant did was an act done within the scope of, or incidentally arising out of, his employment. If so, the defendant would be liable; otherwise he would not. It was held, that in doing this particular act the clerk was not in the relation of servant to the master, so as to make him liable. It had nothing to do with his service, or the duties he had to perform. Lindley, J., said that the facts showed the clerk to be a mere trespasser, and the defendant could not be held liable for the negligence of one who was a trespasser in the room. The distinction as to what would have been an act incidental to the employment, was pointed out by Grove, J. If, instead of a clerk, it had been a housemaid who had left this tap turned on, whose duty it was to clean the room and wipe out the basin, then, although she might have been expressly forbidden to use the basin or to turn on the tap; yet if she did so, her act would be so incident to her employment, that the master would be liable. This illustration points out very clearly, that in order to make a master liable for the negligent act of his servant, that act must flow from the nature of the duties the servant is employed to perform;<sup>1</sup> and whether it does is a question of fact.

Where the servant's act is unauthorized, or one which the master has no power to do, the master is not liable.

But another distinction is established to the effect that, where a servant does an act which his master has no power to do, or which is not impliedly authorized by his master, such act cannot, as a matter of law, be said to be within the scope of the servant's employment so as to bind the master. In *Poulton v. L. & S.W. Ry.*, L.R. 2 Q.B. 534, the plaintiff had taken a horse to a show by the defendants' railway, and was entitled, under the arrangement of the defendants, to take the horse back on the railway free of charge, upon the production of a certificate. The plaintiff

<sup>1</sup> See also *Whatman v. Pearson*, L.R. 3 C.P. 422; *Walker v. S.E. Ry.*, L.R. 5 C.P. 640; *Bayley v. M.S. & L. Ry.*, L.R. 7 C.P. 415; 8 C.P. 148 (*ante*, p. 234); *Moore v. Metropolitan Ry.*, L.R. 8 Q.B. 36; and *Burns v. Foulson* (*ante*, p. 236).

produced the certificate, and the horse was accordingly put into a box without payment, and the plaintiff, having taken a ticket for himself, went by the same train. At the end of the journey, the station-master demanded payment for the horse, and the plaintiff refusing to pay, was detained in custody under the station-master's orders, until the plaintiff's right to have the horse carried free was ascertained. It was held, upon the plaintiff bringing an action against the company for false imprisonment, that a railway company, under their powers, may apprehend a person travelling on the railway without having paid his fare; but have only the power to detain *the goods* for non-payment of carriage. The defendants, therefore, would have had no power to detain the plaintiff on the assumption that he had not paid for the carriage of the horse, and consequently there could be no authority implied from them to the station-master, to act in this way under those circumstances. They were held, therefore, not to be liable for the act of the station-master, which was an unauthorized act. In another case, a foreman porter employed by a railway company, who, in the station-master's absence, was in charge of the station, was held to have no implied authority from the company to give a person in charge whom he suspected to be stealing the company's property. It was pointed out that an act, besides being for the benefit of the master, must also be in the ordinary course of the servant's business, if the master is to be liable. This act was neither one nor the other. It was not for the benefit of the master, except that it is for the benefit of the community in general, that criminals should be arrested. It is every one's duty to give a person in charge whom he thinks is committing a felony, and if the porter was performing that duty, his conduct would have no connection with his employment by the defendants. It might well be said that if the person arrested by the porter had been breaking a bye-law of the company, it would be within the ordinary business

of the company to effect his arrest, and thus the act would have been connected with their business.<sup>1</sup> It would be presumed, in such a case, that the porter had been acting with the company's authority, as, being in charge of the station, he would be authorized to enforce the bye-law. So, also, if an officer of the company were expressly appointed to watch their property, he would have an implied authority to arrest any one he saw stealing it. But in this case, the cause of the arrest was not concerned with the defendant's business; they had given no authority to the porter to arrest any one he suspected, and no implied authority to do so could in the circumstances be presumed.<sup>2</sup>

Bank  
manager's  
authority  
to arrest  
persons.

Again, in the case of *The Bank of New South Wales v. Owston*, 4 App. Cas. 270, it was held in the Privy Council, that the arrest, and still less the prosecution of offenders, is not within the scope of a bank manager's authority, so as to make the bank, who employ him, answerable.

Assault at  
public  
meeting.

There was a case of trespass in which the plaintiff, who had been assaulted at a public meeting by a man who was presumably a steward of the meeting, and by two policemen, sought to make the chairman of the meeting liable; because upon a disturbance taking place, he had ordered the disturbers to be brought to the front of the gallery. The plaintiff was not one of the disturbers, but was seized and brought to the front. There was nothing to show the position or duty of those who had seized him, nor that any instructions as to keeping order had been given to them by the defendant. There was no relation of master and servant proved to exist between the chairman and those who assaulted the plaintiff; and as to the particular order given, it was held that the words of the chairman did not authorize these men to act upon their judgment as to who were the persons making the disturbance.<sup>3</sup> As to this last

<sup>1</sup> *Goff v. G.N. Ry.*, 30 L.J.Q.B. 148; *Moore v. Metrop. Ry.* (ante, p. 240).

<sup>2</sup> *Edwards v. L. & N.W. Ry.*, L.R. 5 C.P. 445.

<sup>3</sup> *Lucas v. Macon*, L.R. 10 Ex. 251.

holding, it seems somewhat remarkable to say, that upon the evidence as to what the chairman said, there was at least no evidence to go to the jury that by giving the order he did, the trespass directly arose as a natural consequence of that order.

In *Allen v. L. & S.W. Ry.*, L.R. 6 Q.B. 65, Blackburn, J., thus laid it down: "There is an implied authority to do all those things which are necessary for the protection of the property entrusted to a person, or for fulfilling the duty which a person has to perform. To apply that principle to the present case, the booking-clerk had an implied authority to do everything that was necessary for the fulfilment of the duty entrusted to him; but he had no implied authority to punish for a supposed infringement of the law." In that case, the clerk gave some one into custody whom he suspected of attempting to rob the till, after the attempt had ceased. That could not be necessary for the protection of the company's property. *Abrahams v. Deakin* (1891), 1 Q.B. 516, was a case on similar facts, and the defendant was held not to be liable because his manager had, after a suspected offence had been committed, followed the plaintiff into the street and there arrested him. His master's property was no longer in danger, and the arrest was made, not for the purpose of guarding the property, but to vindicate the law.

*Jones v. Scullard* (1898), 2 Q.B. 565, was a case involving the question under whose control a man was, as determining whose servant he was.<sup>1</sup> The facts were said never before to have received judicial interpretation. The defendant owned a brougham, horse, and harness, and hired a driver from a livery-stable keeper, who wore the defendant's livery, and had driven him for the preceding six weeks. An accident having occurred to the plaintiff through the driver's negligence, the question was whether, under these circumstances, the driver was the defendant's servant, or

Where a servant arrests some one after offence committed, this is not done in defence of his master's property.

*Jones v. Scullard*: driver supplied to drive own horse and carriage.

<sup>1</sup> This point, with reference to fellow-servants, is dealt with *ante*, p. 161.

the servant of the livery-stable keeper. It was held by Lord Russell, C.J., in a considered judgment, that the driver was at the time the defendant's servant, or at all events that there was evidence justifying the jury coming to that conclusion; because the whole control of the servant was at the time in the defendant. But he said the principle to be extracted from the cases was, that if the hirer simply hires a carriage to drive him for a certain period or for a certain journey, the livery-stable keeper supplying all that was necessary for the purpose, the hirer is in no sense responsible for the driver's negligence (see *ante*, p. 81, and *post*, p. 250); but it was quite different when the brougham and the horse and harness are the property of the person hiring the driver. The distinction being, that in the former case the control of the driver remains in the livery-stable keeper, and in the latter case the hirer has the complete control. Probably the decision in this case depends very greatly upon the fact that the horse was the defendant's. But the reasons given by the learned judge for the materiality of that circumstance show how very fine the line is upon which cases of the kind go. "So long as the hirer contracts with the livery-stable keeper for the supply of a complete equipage to drive him by the day or hour, and the stable-keeper in pursuance of that contract supplies carriage, horses, and the men to drive them, the hirer has no control whatever over the driver, except so far as he can indicate the direction in which he wishes to be driven. He could not order him to increase his speed, for the driver might lawfully refuse to do so on the ground that he was acting under his master's orders in driving slowly. But where the hirer of the coachman is himself the owner of the horse, he is entitled to dictate to the driver as to how fast he shall drive, and the driver is bound to take his orders from him. The driver is in that case under the control of the hirer as to the manner of his driving." It may, with deference, be questioned whether

the reason given is a sound one. What is there to prevent me, when hiring a horse and carriage and driver, from having the reasonable use of what I have hired? Why is it unreasonable to tell the driver to drive slowly or faster, as the case may be, always within reasonable limits? Why would the driver be acting lawfully in refusing to obey my orders as regards the reasonable use of the horse, which is the very purpose for which I have hired it and for which it has been hired to me, by saying that the livery-stable keeper has ordered him not to comply with my reasonable requirements? It has been well settled that a man who hires a horse and carriage and driver from a jobmaster, is not the master of the driver so as to make him liable for the driver's negligence; but it does not appear to be beyond doubt whether the reasons for the distinction between such a case, and the circumstances of *Jones v. Scullard*, are necessarily those advanced by the Chief Justice. One reason may be, that if I have my own horse, and am using it in the streets for my own purposes, I cannot delegate the responsibility of its management to any one who is not acting on my behalf. By so acting, he becomes, for that purpose, my servant. The control of the horse in such case is my control, whether I am driving it myself, or by the hand of another; and I am as liable for the neglect of the driver, as I would be if I had myself driven it negligently.

Perhaps this view, too, affords a reason for the liability of the jobmaster who lets out his horse and man; for in doing so, he is also using the horse for his own purposes, and is liable, therefore, if some one is injured from its being negligently driven.<sup>1</sup>

<sup>1</sup> As to the evidence necessary for a bailor to give of negligence by the bailee for hire, in order to maintain an action for negligence against him, this has been considered *ante*, p. 118.



## CHAPTER XX.

### *Cab proprietors—Omnibus proprietors.*

The  
relation-  
ship  
between  
cab pro-  
prietors  
and  
cabmen—  
*inter se,*  
and as  
regards  
the public.

THE position of a cab proprietor, who entrusts his horse and cab for the day to the driver in the usual way to ply for hire, has been much discussed. It has been settled that at common-law, where a proprietor entrusts his horse and cab to the driver in this way, exercising no control over him, the driver paying the proprietor a certain sum per day; the relationship of bailor and bailee is established between them. In that relationship, the bailor would, of course, not be answerable to a third person who is injured by the bailee's negligence. But it has also been established that the effect of the Hackney Carriage Acts, as regards any mischief done by the driver, is to alter the relationship between the proprietor and the driver into one of master and servant, so as to make the proprietor responsible to any one injured by the driver's negligence.<sup>1</sup>

*Venables v. Smith.*

In *Venables v. Smith*, where a driver obtained a cab for the day on these terms from a cab-proprietor, the latter's responsibility for the injury inflicted upon the plaintiff by the driver's negligence was upheld; and the case of *Powles v. Hider*, 25 L.J.Q.B. 331, followed. At the time of the accident, the driver was on his way back to return the cab. When he came to the mews, he took the cab a little further on to a tobacconist's shop to make a purchase for himself, and on his way back negligently

<sup>1</sup> *Venables v. Smith*, 2 Q.B.D. 279; *King v. London Improved Cab Co.*, 23 Q.B.D. 281; *Keen v. Henry* (1894), 1 Q.B. 292; *Gates v. Bill* (1902), 2 K.B. 38.

drove into the plaintiff. Under these circumstances it was contended, that if the relationship of master and servant existed, the master would only be liable for the tortious acts of his servants done within the course of his employment; and that the facts showed that, at the time of the accident, he was not engaged on his master's business. But it was pointed out by Cockburn, C.J., that in order to determine whether the driver was so acting, it was necessary to look at the terms of the employment. "If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public." Having regard to those terms, there was nothing wrong, or contrary to the terms of the bailment, in the use the driver made of the cab. He could use the cab entirely at his own discretion, and might, if he desired, have used it all day for his own purposes. *King v. London Improved Cab Co. (supra)*, in the Court of Appeal, affirmed this case; and decided that the effect of the Metropolitan Hackney Carriage Act, 1843, was that, without regard to the existing agreement between the proprietor and the driver, or whether the relationship of master and servant exists between them or not, as far as the public is concerned, that relationship must be deemed to exist. The only case which may not be considered consistent with this view of the effect of the Act is *King v. Spurr*, 8 Q.B.D. 104; but that case was one where only the cab belonged to the proprietor, who was sued for the driver's negligence, the driver having himself provided the horse and its equipment. The Court there held, that the act did not apply to such a case so as to convert the relationship of bailor and bailee into one of master and servant, and thus to

User of  
the cab  
by the  
cabman  
within the  
scope of  
the bail-  
ment.

*King v.  
London  
Improved  
Cab Co.*

*King v.  
Spurr  
overruled.*

make the defendant liable. This case was distinguished in *King v. London Improved Cab Co.*, on the ground that only the cab had been hired, though Lindley, L.J., did not appear to regard the distinction as a very tangible one. Probably if a similar state of facts again arose for judicial decision, it would be difficult to contend that *King v. Spurr* had not been overruled. And in the case of *Keen v. Henry* (1894), 1 Q.B. 292 (*ante*, p. 246), in the Court of Appeal (which was similar to *King v. London Improved Cab Co.*), where it was decided that the registered proprietor of the cab is answerable to a person injured by the driver's negligence, all the judges taking part in the decision expressed the opinion, that *King v. Spurr* had been overruled.

Licensed  
proprietor;  
not con-  
clusive  
as to  
liability.

*Gates v. Bill* (1902), 2 K.B. 38 (*ante*, p. 246), carried the matter a little further, and showed that the liability imposed by the Acts relating to hackney carriages is not confined to the licensed proprietor; but that a partner of the licensee, or the real proprietor of the cab, whether the licensed proprietor or not, is also liable. The defendant in that case, and her son, were partners in the business of cab proprietors. One of their cabs, let in the usual way to a cabman, was negligently driven by him, and injured the plaintiff. The license for the cab was taken out in the name of the defendant's son, and he appeared on the register as the licensed proprietor of the cab. The defendant was sued, and was held liable. There was nothing in the Acts, it was held, which makes it an essential condition of a cab proprietor's liability to the public, that he should have obtained a license. Moreover, in this case, as the son was a partner, he must be taken to have registered the cab on behalf of the firm; and the registration operated as the registration of the defendant as a partner in the firm.

Liability  
as between  
proprietor  
and  
cabman.

A question arose in the case of *Fowler v. Lock*, L.R. 7 C.P. 272 (affirmed on appeal 9 C.P. 751 *note*; and again reported 10 C.P. 90), between the cab proprietor and the

driver, which involved the settlement of the relationship that existed between them. The driver had obtained a horse and cab on the usual terms from the proprietor, and had been supplied by him with a horse, which was not reasonably fit to be driven in a cab. It bolted, overturned the cab, and injured the driver. If the proprietor and the driver were in the relation of bailor and bailee, there is an implied warranty by the bailor that the article bailed is reasonably fit to be used for the purpose of the bailment. (See *Hyman v. Nye*, ante, p. 81.) As there had been a breach of this warranty, the proprietor would, in this view, be liable to the driver for the injury sustained on account of this breach. If, however, the relationship was one of master and servant, the servant would have to give some evidence of negligence on the part of the master in order to make him liable. The jury found, that the horse was not reasonably fit for the purpose, and the majority of the Court held, that the relation between the parties was that of bailor and bailee, and, therefore, upon that finding the master was liable. Upon a new trial being obtained, the jury were asked to determine whether the horse and cab were entrusted to the plaintiff as bailee or as servant; a question which would seem to place upon the jury the function of the judge, who has to decide, upon the ascertained facts, what the legal relation of the parties may be; and they found the plaintiff was a bailee. They also virtually found, in answer to a question, that the defendant had been guilty of personal negligence; so that when this verdict came to be reviewed (L.R. 10 C.P. 90), there was nothing left to be said for the defendant upon either alternative relationship between the parties, except that the verdict was against the weight of evidence; and the Court refused to disturb the verdict.

There is also another case, not concerned with cab proprietors, but with a ship which caused injury to one of the public. It was held incidentally that the object

Implied warranty by bailor that bailment is fit for the purpose of the bailment.

Registration of owner of ship not

conclusive as to responsibility to the public for negligence. of the Merchant Shipping Act of 1875, which requires the "managing owner" to be registered, is for the protection of the public; and that the fact of registration, therefore, is not conclusive; and that the relationship of the captain and the "managing owner" *inter se* did not affect the actual owner's liability to one of the public.<sup>1</sup>

Job-master's implied liability. It has already been seen that the undertaking of a jobmaster who lets out a carriage for hire is, that the carriage, the horse, and its equipment are fit for the purpose for which they are let, and a warranty of fitness is implied.<sup>2</sup>

Presumption that driver of omnibus is the authorized driver may be rebutted. Some difference of opinion was manifested by the judges of the Court of Appeal who decided *Beard v. L.G.O. Co.* (1900), 2 Q.B. 530. The plaintiff had been injured by the defendants' omnibus, and in opening his case the plaintiff showed that the conductor, and not the driver, was driving the omnibus at the time of the accident. A. L. Smith and Romer, L.JJ., were of opinion, that the presumption which arises that the person driving the defendants' omnibus is the authorized driver, was rebutted by the plaintiff's evidence that the conductor, who is not the person authorized to drive, was driving; and thereupon the onus was thrown on the plaintiff, of showing some special authority given by the defendants to the conductor authorizing him to drive, in order to establish the fact that the conductor was acting within the scope of his employment, so as to make his masters liable. The plaintiff did not meet that onus, and it was held that the judge at the trial had rightly withdrawn the case from the jury, and given judgment for the defendants. Vaughan Williams, L.J., took a different view, though he thought the judgment right, because the conductor at the time of the accident was not merely turning the omnibus round at the conclusion of a journey, but was driving it in a side street; and the

<sup>1</sup> *Steel v. Lester*, 3 C.P.D. 121.

<sup>2</sup> *Hyman v. Nye* (*ante*, p. 81).

evidence therefore showed that he was not performing a merely temporary duty; and that the driver had delegated his authority to the conductor, which he had no right to do. But he thought there would have been a case for the jury if this had not been so, and that it would then have been upon the defendants to show, that the temporary act was outside the scope of the conductor's authority. "It seems to me," he said, "to be a sounder view that, where a driver and a conductor are sent out in the charge of an omnibus, and complaint is made of some act done by the conductor, it should be left to the jury to say whether that act was within the authority given to the conductor." Although the Lord Justice's opinion was given on facts not before the Court, they become the more pertinent, inasmuch as the other two Lords Justices appeared to decide that in any case where injury arises while a conductor, and not the driver, is driving, the onus is at once cast upon the plaintiff of showing that the conductor was authorized to drive; obviously an onus which might be difficult, if not impossible, for a plaintiff to discharge.

In *Gwilliam v. Twist* (1895), 2 Q.B. 84, the question of a servant delegating authority to another was raised, in conjunction with the consideration of the doctrine of authority by necessity. The driver of an omnibus of the defendant's was drunk, and was ordered by a policeman to desist from driving. When this happened, the omnibus was only a quarter of a mile from the defendant's yard. The driver and the conductor thereupon authorized a stranger to drive the omnibus to the yard, and in the course of the journey this person negligently injured the plaintiff. A servant cannot ordinarily delegate his authority; and all three judges of the Court of Appeal agreed that no case of emergency or necessity had been made out. The owner of the omnibus could easily have been communicated with, and the omnibus in the mean time might have been left where it was. The defendant was therefore held not

A servant delegating authority in his authority; no liability on master unless the delegation arose from necessity.

to be liable for the negligent act of the stranger, who was not in fact, nor by implication of law, his servant. But though, under the facts of this case, the question of delegating authority by necessity did not arise, the M.R. (Lord Esher) was inclined to think, that that doctrine only applied "to certain well-known exceptional cases, such as those of the master of a ship, or the acceptor of a bill of exchange for the honour of the drawer."<sup>1</sup> But in any case, a person can only become an agent of necessity where it is impossible to communicate with the employer. A. L. Smith, L.J., pointed out, that that was the foundation of the doctrine; but whether the doctrine applies to other cases than those indicated by the M.R. remained undecided. It is difficult to see why it should not be extended to any case of real necessity that arises; because the doctrine is founded upon, and arises out of, the idea that it is immediately necessary that some step should be taken, without the possibility of first communicating with the employer—a possible incident arising out of the general authority given to a servant. No doubt, however, the position of a master of a ship is more apt to lead to the occurrence of such circumstances of necessity, than may in other cases be readily conceivable.<sup>2</sup>

<sup>1</sup> *Nicholson v. Chapman*, 2 H. Bl. 254; *Hawtayne v. Bourne*, 7 M. & W. 595.

<sup>2</sup> As to jobmasters, see *Hyman v. Nye* (*ante*, p. 81), *Jones v. Scullard* (*ante*, p. 242); and as to livery-stable keepers, *Searle v. Laverick* (*ante*, p. 82).

## CHAPTER XXI.

*Common carriers—"Act of God"—Inherent defects—  
Carriers' acts — Railway companies — Passengers'  
luggage—Delay in transit of goods and of passengers  
—Contract to carry over lines of another company—  
Warehousemen.*

AT common-law, a common carrier is in the position of an insurer of goods entrusted to him, and is liable for loss or damage happening to them while in his custody, however occasioned; except that he is not liable for loss or injury arising from the act of God, or from the King's enemies, or from an inherent defect in the thing carried.<sup>1</sup> A common carrier is usually defined as one who undertakes to carry, or holds himself out as carrying, from place to place for reward, the goods of any one who chooses to employ him.

The "act of God" is, in a legal sense, something which could not happen by the intervention of man, such as lightning and tempests; such things as could not have been prevented by any reasonable exercise of foresight and care.<sup>2</sup> But in order that an extraordinary natural event should be, in the legal sense, an act of God, it is not necessary that such an event should never before have happened. It is sufficient that it could not have been reasonably anticipated. If such an event had already once happened, and

<sup>1</sup> *Nugent v. Smith*, 1 C.P.D. 423; *Hudson v. Baxendale*, 2 H. & N. 575; *Kendall v. L. & S.W. Ry.*, L.R. 7 Ex. 373; *Blower v. G.W. Ry.*, L.R. 7 C.P. 655.

<sup>2</sup> *Nugent v. Smith (supra)*; *Nichols v. Marsland*, 2 Ex. D. 1; *River Wear Commissioners v. Adamson*, 2 App. Cas. 743.



there is nothing likely to lead to the supposition of its recurrence, it would, if it again happened, still be an act of God within its legal definition.<sup>1</sup> Or, as it was held in another case,<sup>2</sup> in order to show that the cause of the loss was irresistible, the carrier need not prove that it was absolutely impossible to prevent it; it is sufficient for him to show that he could not have prevented it by any reasonable precautions on his part.

Loss occasioned both by negligence and the act of God.

It may happen that damage is occasioned both by negligence, and by the act of God. In such a case, where a defendant is guilty of a breach of duty sufficient to cause the injury, he cannot escape liability by showing that the same damage would have arisen from an act of God, even if he had not committed the breach of duty. But if he can show that some of the damage arose from a cause beyond his control, the liability for damage will be apportioned.<sup>3</sup>

“Inherent vice.”

Where, without any negligence on the carrier's part, the thing carried is injured by its “inherent vice” the common carrier is not liable. A bullock was being carried by a railway company as common carriers, and on the journey it escaped from its truck, without negligence by the company's servants, and was killed on the line. The escape was wholly attributable to the “inherent vice” of the animal, and therefore the company were held not to be liable in damages. “By the expression ‘vice’ I do not, of course, mean,” said Willes, J., in his judgment in this case,<sup>4</sup> “moral vice in the thing itself or its owner, but only that sort of vice, which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result

<sup>1</sup> *Nitro-phosphate Co. v. London & S. Katherine Docks*, 9 Ch. D. 503.

<sup>2</sup> *Nugent v. Smith (supra)*. And as to liability of a public body, see *Dixon v. Metropolitan Board of Works*, 7 Q.B.D. 418.

<sup>3</sup> *Nitro-phosphate Co. v. London & S. Katherine Docks (supra)*; *Dixon v. Metropolitan Board of Works*, 7 Q.B.D. 418.

<sup>4</sup> *Blower v. G. W. Ry.*, L.R. 7 C.P. 655.

in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties." There was an express finding in this case, that the truck was in every respect properly and reasonably sufficient for the conveyance of the bullock; and this finding was sufficient to exclude any suggestion of negligence.

A similar decision of law arose in the case of a horse carried by a railway company;<sup>1</sup> but as the question of fact how the horse came by its injuries was necessarily a speculative one, a difference of opinion arose upon it. *Kendall's case*: onus of proof considered by the judges. Piggott, B., thought the onus of proof was on the defendants to show how the accident occurred, and that if they relied on the exception of "inherent vice," they must show affirmatively that the case was within this exception. This onus, he thought, the defendants had not discharged. Bramwell, B., however, with whom Martin, B., doubtfully agreed, held that the question of burden of proof did not arise in the case. Each party had given evidence: the defendants' witnesses, to the effect that the train proceeded without disturbance, and that there was no inducing cause of mischief except the horse's inherent disposition; and the plaintiff's witnesses, that the horse was a quiet one, used to railway travelling, and that there must have been something extraordinary to excite it. That, he thought, was a question of fact for the jury; and as it was left to the judges, he found as a fact for the defendants. The plaintiff had shown that it was improbable that the accident was due to the "proper vice" of the horse; but the defendants had shown that it was impossible that the injury could have been otherwise caused. This, then, resolved itself merely into a question of fact; but the view taken by Piggott, B., that as the defendants had the sole control of the horse, they alone could know how the accident happened, and that therefore they must show affirmatively that they were within the exception upon

<sup>1</sup> *Kendall v. L. & S.W. Ry.*, L.R. 7 Ex. 373 (*ante*, p. 253).

which they relied, would seem to have been sufficiently complied with by the defendants' showing, by a process of exhaustion, that there was nothing whatever to account for the occurrence but the animal's inherent disposition. *Nugent v. Smith*, 1 C.P.D. 423 (*ante* p. 254), was another case of "inherent vice" in a mare carried on board ship by a common carrier by sea.

Inherent defects in inanimate things.

The same rule applies to inanimate things as to animals; the carrier is not responsible for damage caused by inherent defects. Willes, J., in *Blower's case* (*ante*, 254), cited a passage from Story on Bailments (sec. 492a, 9th ed.), which, he said, laid down the law very accurately, in which that learned author pointed out, that the carrier is not responsible for losses "which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases."

Dog delivered to carrier apparently well secured; carrier not liable if

A case analogous to that of improper packing occurred in regard to a dog, which was being carried by a railway company who were not common carriers of dogs, and who were, therefore, in the position of ordinary bailees who are liable for negligence, and not liable if the injury were due

to or were contributed by the negligence of the bailor. The dog, which was delivered to the company with a collar and strap on it, was in the course of the journey necessarily changed from one train to another. While then waiting for the train to come up, it was properly attached by means of the collar and strap to a post. It, however, slipped its collar, got on to the line, and was killed. It was held that there was no negligence on the company's part, as the dog was fastened by the means furnished by the owner himself, which, at the time, appeared to be sufficient.<sup>1</sup> In an old case, where the defendant was a common carrier, and when the dog was delivered to the defendant's servant he had the means of seeing that it was insufficiently secured, the defendant was held liable for the loss of the dog who had escaped.<sup>2</sup> But in *Richardson's case*, the mode of securing the dog was the one ordinarily adopted, and not apparently insufficient. But in any case where the carrier or his servant has been negligent, as where a cow, though ultimately killed by reason of its "inherent vice," was negligently taken out of its truck, whereby it escaped, the carrier is liable.<sup>3</sup>

dog lost because it was not in fact well secured.

But otherwise, if dog delivered with an obviously insecure fastening.

Where dangerous substances are delivered to a common carrier to be carried, without informing him of their dangerous nature, and loss or injury thereby arises, the person so delivering the dangerous goods is liable. Where the defendant, in *Farrant v. Barnes*, 31 L.J.C.P. 137, delivered to the plaintiff, who was one of the servants of a carrier, a carboy containing nitric-acid, in order that it might be carried by the carrier, and the defendant did not take reasonable care to inform the plaintiff that the acid was dangerous, he was held liable to the plaintiff, who was burnt and injured because the carboy burst while he was

Dangerous substances delivered to be carried.

<sup>1</sup> *Richardson v. N.E. Ry.*, L.R. 7 C.P. 75.

<sup>2</sup> *Stuart v. Crawley*, 2 Stark. 323.

<sup>3</sup> *Gill v. M.S. & L. Ry.*, L.R. 8 Q.B. 186.

Carriers cannot refuse to carry parcel because they are not told what is in it.

carrying it on his back.<sup>1</sup> Though by sec. 105 of the Railway Clauses Consolidation Act, 1845, a railway company cannot be required to carry dangerous goods (and a penalty is imposed on any one sending such goods without notice), yet a company, who are common carriers, are not at liberty to refuse to carry packed parcels, merely because they are not told what they contain.<sup>2</sup>

Liabilities of carriers now in part regulated by statute.

Common carriers of goods could, however, limit their common-law liability by special contract; and to protect themselves, they were in the habit of publishing notices limiting their liabilities, and imposing certain conditions. Upon construing and applying these notices, so many questions arose, that it became necessary to regulate the rights and duties of common carriers by statute. As regards carriers by land and canal, the following Acts were passed: the Carriers Act, 1830 (11 Geo. 4. & 1 Will. 4. c. 68); the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); the Regulation of Railways Acts, 1868 and 1873 (31 & 32 Vict. c. 119, and 36 & 37 Vict. c. 48); and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). The common-law liabilities of carriers by sea are, for the most part, limited and regulated by the charterparties or bills of lading, and by the Merchant Shipping Acts (17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63).

Carriers Act: goods above the value of £10.

The Carriers Act enumerates a number of articles for the loss or injury to which, carriers by land shall not be liable when the value exceeds £10; unless, at the time of delivery to the carrier, the value and nature of the articles is declared by the sender, and an increased charge paid by him, and accepted by the carrier. Carriers are empowered by the Act to demand increased rates for packages containing such articles above the value of £10, and to make announcement of such demand by legible notices fixed in their offices; and persons sending such packages

<sup>1</sup> And see *Brass v. Mailland*, 26 L.J.Q.B. 47.

<sup>2</sup> *Crouch v. L. & N.W. Ry.*, 23 L.J.C.P. 73.

are bound by these notices without any further proof that they have come to their knowledge. But carriers cannot by a notice limit their common-law liability as regards articles in respect of which they are not entitled to the benefit of the Act; and they are by the Act made responsible to answer for loss or injury caused by the felonious acts of their servants. Responsi-  
bility of  
carriers  
for  
felonious  
acts of  
their  
servants.

Where goods have been delivered to carriers for carriage which are above the value of £10, and are stolen during the transit, and an action is brought against the carrier under the Carriers Act (1830), it is not necessary that the alleged felonious act on the part of the carrier's servants should be brought home to any particular servant, in order to establish the plaintiff's case. It is enough if there is evidence sufficient to satisfy a jury that the felonious taking was by some one who was more or less the carrier's servant, without specifying the particular servant.<sup>1</sup> But it is not sufficient merely to show that the facts are more consistent with the defendant's servants having been guilty of the felonious taking, than with some one else, who is not the defendant's servant, having taken them.

Thus, Cockburn, C.J., in *McQueen's case*, when dealing with the contrary proposition as apparently laid down in *Vaughton v. L. & N.W. Ry.*, L.R. 9 Ex. 93, said: "I think that proposition is not maintainable. It appears to me that the question of probability or improbability can only be considered as an element in the consideration of the general case." Both in *McQueen's case* and in *Vaughton's case* goods above the value of £10 had been delivered to the carriers for carriage, and had been stolen in transit. Under the special circumstances of *Vaughton's case*, the plaintiff succeeded; but in *McQueen's case* he was held not entitled to recover. These cases, too, were considered in reference to the Carriers Act, 1830, sec. 8. It was not necessary to consider the effect of sec. 7 of the Railway and Canal

<sup>1</sup> *McQueen v. G.W. Ry.*, L.R. 10 Q.B. 569.

Under sec. 8 of the Act of 1830, unnecessary to show negligence to enable plaintiff to recover.

Traffic Act, 1854, because no special condition had been imported into the contract. Sec. 8 of the Act of 1830 (which saves the liability of carriers in respect of loss or injury to goods "arising from the felonious act of any . . . servant" of the carrier) is not a general enactment, but is confined to the articles specified in sec. 1; and under that section, carriers are expressly made liable for the felonious acts of their servants. Under that section, therefore, felony by a servant is a sufficient answer to a defence by a carrier, by the force of the statute itself; and if felony is proved, it is altogether unnecessary to show any acts of negligence by the carrier or his servants. But where a carrier gives notice that he will not be responsible for loss occasioned by the neglect or default of himself or his servants, it has been held that where no negligence is shown, a theft by a railway company's servant is not such a loss within the meaning of sec. 7 of the Railway and Canal Traffic Act, 1854; and that therefore the company could protect themselves at common-law against liability, by means of a special contract, even though such contract was not a reasonable one within the requirement of the Act. This was held, and apparently for the first time, on the construction of the language of the section, in *Shaw v. G.W. Ry.* (1894), 1 Q.B. 373, where the history of the passing of the Act of 1854 is stated by Wright, J., who delivered the judgment of the Court. Sec. 7 of that Act, therefore, extends only to negligence, or default in the nature of negligence, and which is within the scope of a servant's employment; and not to theft without negligence.

Under the Act of 1854, sec. 7, plaintiff, in order to recover, must show that the theft had been brought about by the defendant's negligence.

No defence under sec. 8 of the Act of 1830, that value has not been declared; unless there has

A carrier within sec. 8 of the Carriers Act, where valuables have been stolen, cannot succeed in his defence by showing that they had been delivered to him to be carried without their value having been declared, though he had given notice that he would not receive them unless declared or insured.<sup>1</sup> Unless an actual misrepresentation

<sup>1</sup> That the exception of insurance risks does not discharge carriers

was made at the time of delivery of the goods, or an actual fraud perpetrated, this forms no defence.<sup>1</sup>

Under the Carriers Act (as also under the Railway and Canal Traffic Act) "servants" of the carrier include agents who, though not strictly servants, are employed by the companies to do for them what they have contracted to do.<sup>2</sup>

A railway company had a parcel of silk delivered to them at one of their receiving-offices to be carried to a station on their line. The goods were collected by the defendants at the office, and taken to one of their stations. While there, the son of the proprietor of the receiving-office, who was in his employ, stole the goods by means of a forged order of delivery to him. It was held, under sec. 5 (which deals with receiving-houses, etc.) and sec. 8 of the Carriers Act, that the loss had arisen from the felonious act of a person who was a servant of the company within the meaning of sec. 8.<sup>3</sup> But where goods had been stolen from the defendant's yard by a man who fraudulently personated a servant of the defendant company; on the issue raised by the plaintiff that the loss occurred from the felonious act of one of their servants, the company are not precluded from showing that the thief was not in fact a servant of theirs.<sup>4</sup>

In the case of *McKean v. McIvor*, L.R. 6 Ex. 36, the

from their liability as common carriers, see *Sutton v. Ciceri*, 15 App. Cas. 144; and Walton, J., held, in *Price v. Union Lighterage Co.* (1903), 1 K.B. 750, that where a barge-owner under a contract of carriage was exempt from liability "for loss or damage to goods which can be covered by insurance," he is not exempt from loss or damage arising from the negligence of his servants, although such a loss would be covered by an ordinary marine policy.

<sup>1</sup> *Walker v. Jackson*, 10 M. & W. 161; *Shaw's case* (*supra*).

<sup>2</sup> *Doolan's case*, 2 App. Cas. 792; *Machu v. L. & S.W. Ry.*, 2 Ex. 415.

<sup>3</sup> *Stephens v. L. & S.W. Ry.*, 18 Q.B.D. 121.

<sup>4</sup> *Way v. G.E. Ry.*, 1 Q.B.D. 692.



*McKean's  
case.*

plaintiffs were also unsuccessful in charging the defendants with negligent misdelivery of goods whereby they were stolen. The plaintiffs had received a fictitious order from one of their travellers to send goods to C. Tait & Co. at an address at Glasgow. They forwarded the goods by the defendants, who were carriers. In the usual course of business, which the plaintiff must be taken to be aware of, the defendants, upon the arrival of the goods at Glasgow, sent a notice to the address given by the plaintiffs, requesting their removal, and stating that the notice must be produced, indorsed as a delivery order. The traveller accordingly indorsed the notice "C. Tait & Co."—there being no such persons—and obtained delivery. Here, the defendants had obeyed the plaintiffs' directions; no negligence on the defendants' part was shown; and the plaintiffs were, "as it were, estopped from saying that there were no such persons as 'Tait & Co.'" There was therefore no misdelivery amounting to a conversion; and no negligence had been proved.

*Heugh's  
case.*

*Heugh v. L. & N.W. Ry.*, L.R. 5 Ex. 51 (*ante*, p. 231), was a similar case; but there the fictitious order, on which the plaintiff had sent goods by the defendants, was to supply them to a company who had ceased to do business. The defendants tendered the goods at this company's address, and they were refused. Thereupon, the defendants became involuntary bailees, who were bound to act with reasonable care in regard to the goods. The goods were afterwards obtained, in the usual course of the conduct of the defendants' business, by the person who had sent the fictitious order to the plaintiff. It was held that it was for the jury to say whether the defendants had acted with reasonable care; and the jury having found for the defendants, the Court refused to disturb their verdict.

Unauthor-  
ized act  
of in-  
voluntary

But if an involuntary bailee does an unauthorized act, by which the goods carried are stolen, he will be liable as for a conversion. The plaintiffs in *Hiorst v. Bott*, L.R.

9 Ex. 86 (*ante*, p. 231), sent to the defendants an invoice for barley, stating that the barley was bought by the defendant of them through Grimmett as broker, together with a delivery order making the barley deliverable to the order of the consignor or consignee. The defendant had not, in fact, ordered the barley. Grimmett called on the defendant, who showed him the documents and said it was a mistake. Grimmett admitted it was, and persuaded the defendant to indorse the delivery order to him, on the ground that it would save the expense of obtaining a fresh delivery order. The defendant thereupon indorsed the order to Grimmett, who thereby obtained the goods, and appropriated them. The jury, in an action of trover, found that the defendant had no intention himself of appropriating the goods, but indorsed the order with the intention of correcting the mistake, and returning the barley to the plaintiffs. But the defendant was held liable; because he had without authority, and without necessity, indorsed the order, whereby the barley was stolen.<sup>1</sup>

Notices must (by the Railway and Canal Traffic Act, 1854)<sup>2</sup> be adjudged by the Court, if any question arises as to them, to be "just and reasonable," and special contracts must be signed by the consignor, if they are to have effect in limiting the carrier's liability. This was provided by a cumbrous and involved section (sec. 7), which has been finally construed by the House of Lords in *Peek v. N. Staff. Ry.*, 10 H.L.C. 473; 32 L.J.Q.B. 241, where the construction of Jervis, C.J., in a previous case was adopted, as follows: no general notice given by a railway company shall be valid in law for the purpose of limiting the common-law liability of the company as carriers. This

bailee  
may make  
him  
liable.

Special  
notices  
must be  
reason-  
able.

Construc-  
tion of  
sec. 7  
(Railway  
and Canal  
Traffic  
Act) by  
the House  
of Lords.

<sup>1</sup> And see *Jones v. Hough*, 5 Ex. D. 115, where there was held to be no conversion.

<sup>2</sup> Extended by sec. 16 of the Regulation of Railways Act, 1868, to traffic on board steamers belonging to, or used by, railway companies authorized to use them. See *Cohen v. S.E. Ry.*, 2 Ex. D. 253.

common-law liability may be limited by such conditions as the Court or a judge shall determine to be just or reasonable; but with this proviso, that any such condition so limiting the liability of the company, shall be embodied in a special contract in writing, between the company and the owner or person delivering the goods to the company; and the contract in writing shall be signed by such owner or person.

The question whether a condition is a reasonable one within the Act of 1854 is for the judge alone, even though its consideration involves questions of fact.<sup>1</sup>

[The principles on which the Court acts in determining whether conditions are reasonable, will be found stated in *Brown v. M.S.L. Ry.*, 8 App. Cas. 703; *Lewis v. G.W. Ry.*, 3 Q.B.D. 195; *G.W. Ry. v. McCarthy*, 12 App. Cas. 218; *Peck v. N. Staff. Ry.*, 32 L.J.Q.B. 241; *Ashendon v. L.B. & S.C. Ry.*, 5 Ex. D. 190; *Dickson v. G.N. Ry.*, 18 Q.B.D. 176; *Winsford Local Board v. Cheshire Lines*, 24 Q.B.D. 456; *Gordon v. G.W. Ry.*, 8 Q.B.D. 44.]

Non-liability under Carriers Act for loss by delay of a thing while in defendant's possession as a carrier.

If goods, the value of which ought to be declared under the Carriers Act, but are not declared,<sup>2</sup> are lost within the meaning of that Act, the carrier, by virtue of the Act, is not liable for the loss. But the question arose whether under these circumstances a carrier is liable, not for the permanent loss of the goods, but for the damage sustained by their temporary loss. In other words, whether he is liable in respect of a delayed delivery of the goods. It was held in *Millen v. Brasch*, 10 Q.B.D. 142, in the Court of Appeal, reversing the judgment of Lopes, J., 8 Q.B.D. 35, on the construction of the Act, that as the carrier is not liable for the loss of undeclared goods, he is also not liable for the consequences of the loss; that not being liable for a permanent loss, he is also absolved from liability where the goods are only temporarily lost, or detained, and finally

<sup>1</sup> *Per* Lord Herschell: *G.W. Ry. v. McCarthy* (*supra*).

<sup>2</sup> See *ante*, p. 258.

restored to the owner. Whether, however, goods are lost by the carrier within the meaning of the Act, depends on the facts of the case. In *Millen v. Brasch* they were so lost. The plaintiff had delivered to the defendants a trunk containing goods within the Carriers Act exceeding £10 in value, which he had not declared, to be carried from London to Rome. They were to go by rail from London to Liverpool, and thence to be shipped to Italy. Owing to the defendants' negligence, the goods at Liverpool were put on board a vessel bound for New York, and carried there; and the plaintiff was obliged to replace the articles at enhanced prices. The goods were, after some long lapse of time, restored to the plaintiff; and this loss was a loss by the carrier under the Act, which absolved him from liability. But if after goods have been temporarily lost, they are not delivered by the carrier within a reasonable time after he recovers them; the carrier would not be within the protection of the Act. He would have been guilty of a breach of duty in not delivering them, and will be liable for their detention.<sup>1</sup> At the same time, it is to be observed, that the carrier is also out of the protection of the Act if the sender declares the value of the goods above £10, and the carrier, nevertheless, chooses to carry them without requiring any extra payment. In that case, he cannot claim the protection of the Act if the goods are lost, and he will be subject to his common-law liability. This state of things occurred with regard to a valuable picture, the value of which was declared at the time when it was delivered to the carrier, and no increased rate was demanded by the carrier. The picture was injured during the journey, and the statute was held, under those circumstances, not to prevent the carrier's common-law liability from applying.<sup>2</sup>

*Millen v. Brasch.*

Goods temporarily lost by carrier must be delivered within reasonable time after they are recovered. Where value declared, carrier is no longer within the Act, even though he does not demand an extra rate.

A similar construction of the Carriers Act to that *Morritt's case*:

<sup>1</sup> *Hearn v. L. & S.W. Ry.*, 10 Ex. 793.

<sup>2</sup> *Behrens v. G.N. Ry.*, 31 L.J. Ex. 299.

goods  
carried to  
a wrong  
destina-  
tion.

arrived at in *Millen v. Brasch*, was also put upon it by the Court of Appeal in the previous case of *Morritt v. N.E. Ry.*, 1 Q.B.D. 302, where also the goods (above the value of £10 and undeclared) had been carried to their wrong destination and been injured. The plaintiff there had travelled with the articles (two water-colour drawings) to Darlington, taking a ticket to that place. When he arrived there, he took another ticket to another place, and told the porter to put the drawings into the train by which he was starting. The porter did not do so, and they were carried on to Durham, and, when recovered by the plaintiff, they had been considerably injured. The plaintiff was not allowed to recover; the construction of the Carriers Act being, that the Act applied to the case of goods negligently carried beyond their destination, and the defendants therefore were within its protection. The injury had occurred while the pictures were in their possession as carriers, and being above the value of £10 and undeclared, the loss was one within the Carriers Act, which protected them from liability.

Condition  
on ticket  
exempting  
from  
liability  
for loss,  
etc., aris-  
ing "off  
their own  
line."

But where there was no question of the £10 limit, and a passenger took a through-ticket from the defendant company to a place which had to be reached by going over another line, the condition on the ticket being, "The company does not hold itself responsible for any delay, detention, or other loss or injury arising off their own line," the plaintiff was held entitled to recover under these circumstances. On arriving at the place where he had to change on to the other line, he gave his luggage to the porter (of whose services the defendant company, had the use by agreement with the other company), who wheeled it to the platform. It there disappeared. It was held that the luggage was still in the defendant company's custody, and notwithstanding the condition, they were liable: *Kent v. Midland Ry.*, L.R. 10 Q.B. 1.

Liability A common carrier is bound to deliver the goods he

contracts to carry, within a reasonable time; but not, in the absence of a special contract, within any given time. And to determine what is a reasonable time, all the circumstances are to be considered; and he is not responsible for the consequences of delay which arise from causes beyond his control. For example, where the delay was occasioned by an unavoidable obstruction on their line, due solely to the negligence of another company who had running powers over their line, the company was not liable.<sup>1</sup>

A carrier is not bound to carry goods by the shortest route, but only by the route by which he usually carries them, and by which he professes to go.<sup>2</sup> But carrying them in this way, he is bound to use ordinary diligence in forwarding them, and whether he has done so or not is a question for the jury.<sup>3</sup>

The Regulation of Railways Act, 1871, sec. 12, applies to cases where a railway company, under a contract to carry persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to them nor worked by them; and the company are liable for damage in the same manner as if the vessel had belonged to them. This section extends the provisions of the Regulation of Railways Act, 1868, and of the Railway and Canal Traffic Act, 1854, to the carriage of goods which the company contract to carry themselves, but have carried for them in ships which do not belong to them. The Act of 1854, while it applies to the whole traffic on railways, and not merely to their passenger traffic, was confined to traffic upon railways or canals only: *Doolan v. Midland Ry.*, 2 App. Cas. 792.

<sup>1</sup> *Taylor v. G.N. Ry.*, L.R. 1 C.P. 385. See, too as to liability of a charterer to demurrage for delay in discharging the cargo, not due to the master and crew, but to the custom of the port: *Postlethwaite v. Freeland*, 5 App. Cas. 599.

<sup>2</sup> *Myers v. L. & S.W. Ry.*, L.R. 5 C.P. 1.

<sup>3</sup> *Hules v. L. & N.W. Ry.*, 32 L.J.Q.B. 292.

Company  
acting  
illegally  
cannot set  
this up as  
a defence.

It is no defence that the railway company, not being authorized to own or work steamboats, do so illegally. The company cannot set up their own wrong against a plaintiff who contracted with them in ignorance of their illegal action. If they could, the result would be, that companies who were wrongfully working steamers, would be in a better position than those who were duly authorized to do so; the authorized ones being subject to restrictions imposed by the Legislature on railway companies, while those who were acting illegally would be free from them: *Doolan's case* (*ante*, p. 267).

Goods  
carried  
partly by  
land and  
partly by  
sea.

Railway companies, however, who carry passengers and goods partly by railway, and partly by their own ships, are entitled, as to losses at sea, to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts; by which their liability is limited to £15 per ton on the tonnage of the ship: *L. & S.W. Ry. v. James*, L.R. 8 Ch. 241. This limitation of damages does not apply to damages for delay (*ibid.*).

A passenger took a return ticket from London to Jersey by the South-Western Railway, and on the return journey gave a chronometer at Southampton station to a porter, who then, in the presence of the passenger, placed it on the seat of the railway carriage. This chronometer was above the value of £10, and had not been declared. The plaintiff then went away for a few minutes, and on his return the chronometer had disappeared. He brought an action against the company. The chronometer was an article within the Carriers Act, and if the company were entitled to the protection of that Act, they would not be liable for the loss. It was argued that they were not within it, because the contract was to carry by water as well as by land, and that though the article was lost on land, the contract could not be divided. It was held, however, that the contract was divisible, and the carrier

was protected by the Act so far as the land carriage was concerned.<sup>1</sup>

But as regards the personal luggage of passengers, railway companies are liable as insurers; and this is so whether the luggage is in the same carriage as the passenger, or given into the care of the company's servants. A passenger from Boulogne to London took a through ticket, on which was printed: "The company is in no case responsible for luggage of the passenger travelling with this through ticket of greater value than £6." The passenger travelled with a box which she gave in charge of the company's servants, and in consequence of their negligence it fell into the sea and was damaged to the amount of £75. The condition on the ticket was held to be void under sec. 7 of the Act of 1854 and sec. 16 of the Act of 1868, there being no signed contract, and she was held entitled to recover the whole amount of the damage: *Cohen v. S.E. Ry.*, 1 Ex. D. 217; affirmed 2 Ex. D. 253.<sup>2</sup>

A case with regard to hand luggage, was decided in *The G.W. Ry. v. Bunch*, 13 App. Cas. 31 (in which *Bergheim v. G.E. Ry.*, 3 C.P.D. 221, decided by the Court of Appeal, was overruled), and from the judgments it appears, that whether it be hand luggage or van luggage, the result is the same. "The contract," said Lord Watson, "ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory." There was also a question upon the facts of the case whether the plaintiff (who arrived at the Paddington station forty minutes before her train started), had given porter too

<sup>1</sup> *Le Conteur v. L. & S.W. Ry.*, L.R. 1 Q.B. 54. And see *Baxendale v. G.E. Ry.*, L.R. 4 Q.B. 244.

<sup>2</sup> And see *Doolan v. Midland Ry.*, 2 App. Cas. 792.



soon before  
the de-  
parture of  
the train.

her luggage into the custody of the porter for the purposes of present, or future transit. This is always a question of degree; and it was held that there was evidence to justify the finding of the County Court judge, that the bag was in the custody of the company for the purposes of present transit. But, if a person entrusts his luggage to a porter for deposit and custody, as distinguished from what Lord Halsbury in the same case called "the physical handing over for the purpose of transit," the defendants would not be liable. In such case, it would not be in the company's custody for the purpose of the journey; and whether it is so or not is a question of fact to be determined in reference to the company's ordinary course of business. An illustration of the modification to which Lord Watson alluded, of a passenger interfering with the company's exclusive control of his luggage, occurred in the case of *Talley v. G.W. Ry.*, L.R. 6 C.P. 44. A passenger had had his portmanteau placed, by his request, in the carriage with him. At an intermediate station he got out, and negligently failed to find the same carriage, and finished his journey in another one. During the latter part of the journey, the portmanteau was robbed by persons in the carriage, without any negligence of the company. In these circumstances the company were held not to be responsible for the loss.<sup>1</sup>

Plaintiff's  
own  
negli-  
gence  
with  
regard  
to his  
luggage.

Termina-  
tion of  
company's  
obligation  
after  
arrival at  
destina-  
tion.

Further, with regard to passenger's luggage, the company are also bound to have the luggage ready for delivery to the passenger upon the platform, when it has reached its destination; until the passenger, exercising due diligence, can receive it; and the company's liability does not cease until a reasonable time has elapsed for the passenger to take the luggage away.<sup>2</sup> What is a reasonable time in which the passenger shall take his box away must depend on the

<sup>1</sup> And see *Richards v. L.B. & S.C. Ry.*, 7 C.B. 839; *Butcher v. L. & S.W. Ry.*, 16 C.B. 13.

<sup>2</sup> *Patschieder v. G.W. Ry.*, 3 Ex. D. 153.

circumstances. "As far as regards any question of law to be laid down upon the subject," said Cleasby, B., "I should have no hesitation in saying that the mere throwing the box out upon the platform, mixed as it might be with other luggage, was not a delivery or a discharge of the defendants' obligation. It must be kept there until the passenger has the opportunity of calling for it, and receiving it." But that is subject to the passenger exercising due diligence in the matter, and claiming the luggage within a reasonable time.

That being the burden imposed on the company, the passenger cannot, as a matter of convenience to himself, prolong its operation beyond the period when the company has done everything necessary to give delivery, and a reasonable time has passed to enable the passenger to take delivery. Making a porter your own agent and not the company's. A lady arrived at a station on the London and North-Western Railway with two boxes in the luggage van. A porter took them out of the van, and asked her if she wanted a cab. She, however, elected to walk, and told the porter she would leave her luggage at the station for a short time, and send for it; and the porter promised to take care of it. One of the boxes was missing when the lady afterwards sent for her luggage; and she brought an action to recover the value of the box and its contents. She was not permitted to succeed. What had taken place was held to have been a delivery of her luggage by the company to her; and a re-delivery of it by her to the porter, as her agent, and no longer the company's, to take care of it. The company were therefore not responsible for the loss, though possibly the porter may have been.<sup>1</sup>

"Personal" or "ordinary" luggage has been defined as "Personal" luggage. being, whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the class to which he belongs, either with

<sup>1</sup> *Hodkinson v. L. & N.W. Ry.*, 14 Q.B.D. 228.

reference to the immediate necessities or to the ultimate purpose of the journey.<sup>1</sup>

Cloak-room:  
company  
may make  
their own  
conditions  
as to  
liability.

It may be said, as was urged for the defendants in *Bunch's case* (*ante*, p. 269), that as the company provided cloak-rooms for the deposit of luggage under certain conditions, a person arriving forty minutes before the train started ought to have placed her luggage in the cloak-room. But this contention did not succeed in *Bunch's case*, because the County Court judge, who tried the case in the first instance, found, as a fact, that the time of entrusting the luggage to the porter was a reasonable and proper time before the departure of the train; a conclusion with which the judges in the House of Lords agreed.

A railway company can, by giving proper notice, limit their liability in respect of articles deposited in their cloak-room, and the question of the reasonableness of any condition they impose does not arise; because the contract they make is a common-law contract of bailment. Where a notice on the ticket, given on the deposit in the cloak-room of a gun worth more than £10, plainly stated, "The company will not be responsible for any package exceeding the value of £10," this condition was held to free them from any liability for damage to the gun occasioned by their negligence during the time it was in their custody: *Pratt v. S.E. Ry.* (1897), 1 Q.B. 718.

A rather startling illustration is afforded in a case, where a passenger on arrival deposited her luggage with a clerk of the defendants at their cloak-room, the condition on the ticket exempting the company from any liability for loss, etc., to any package warehoused with them beyond the value of £5, unless the value were declared, and an

<sup>1</sup> *Macrow v. G.W. Ry.*, L.R. 6 Q.B. 612. But see *Hudston v. Midland Ry.*, L.R. 4 Q.B. 366, where a rocking-horse was not allowed to be "ordinary luggage," and the company were justified in refusing to carry it free of charge. Nor is a bicycle "personal luggage": *Britten v. G.N. Ry.* (1899), 1 Q.B. 243.

extra rate paid; and also from any loss, etc., unless the articles were left in the cloak-room. As a fact, the luggage was not put by the defendants' servants in the cloak-room, but was left in a vestibule without any protection, and was stolen, owing to this negligence of the defendants' servants. The plaintiff brought her action; but it was held that the conditions on the ticket were applicable to the loss, and protected the defendants, although the luggage had not been placed in the cloak-room.<sup>1</sup> The company were not bound to receive the goods at all, and they could impose any conditions upon agreeing to receive them. The majority of the Court were of opinion, that the contract should be construed as meaning, that the company were to keep the goods with reasonable and proper care in any way they pleased; and that depositing the luggage in the vestibule was no breach of the contract, if they had taken such reasonable care. If the goods had been under the value of £5 the company would have been liable; not because the goods had been placed in the vestibule, but because they had not been properly guarded when there. As the goods were above that value, the condition that the defendants would not be responsible, unless the value was declared, applied, and protected the defendants. The view of Lush, J. (who dissented), on the construction of the contract was, that as the goods had never been deposited in the cloak-room, they were not subject to the condition.

As long as the company have done that which is reasonably sufficient to give notice of the conditions, a plaintiff cannot be heard to say that he has not read them.<sup>2</sup>

The question relating to unpunctuality of trains, where-  
by a passenger is delayed on his journey, and what he is  
entitled to do under the circumstances by way of remedying  
Delay of passengers by unpunctuality of trains.

<sup>1</sup> *Harris v. G.W. Ry.*, 1 Q.B.D. 515.

<sup>2</sup> *Richardson v. Rowntree*, 1894, A.C. 217; *Parker v. S.E. Ry.*, 2 C.P.D. 416; *Watkins v. Rymill*, 10 Q.B.D. 178, where the cases are reviewed; *Burke v. S.E. Ry.*, 5 C.P.D. 1.

the default of the railway company, was discussed at some length in *Le Blanche v. L. & N.W. Ry.*, 1 C.P.D. 286, with reference to the conditions under which the company contracted to carry their passengers.<sup>1</sup> The plaintiff took a through ticket from the defendant company from Liverpool to Scarborough. This necessitated his changing at Leeds, which is all the distance the defendants' train went. He ought, according to the time-tables, to have caught a train at Leeds which would have brought him to York, in time to get a train there to Scarborough, due at 7.30 p.m. He arrived too late at Leeds to catch this train to York; and he found that the next train to Scarborough would only bring him in there at 10 p.m. He was merely going there for pleasure, and there was no immediate personal necessity for his being there at any particular time. When he found that he had missed the train to Scarborough, he decided not to wait for the next one, but to order a special train of the North-Eastern Railway. This he did, at a cost of some twelve pounds, and arrived at Scarborough between 8.30 and 9 p.m. He then sought to recover the expense of taking the special train from the defendant company. Although the County Court judge had found that there had been wilful delay by the defendant company, when the case came before the Court of Appeal, it was held that he could not recover the cost of the special train, and was only entitled, at most, to nominal damages. The reason he could not obtain that amount as damages was, that though where one party to a contract neglects to perform it, the other may do so as near as may be at the expense of the party in default<sup>2</sup>; yet he cannot do so

<sup>1</sup> For cases as to where conditions on, or referred to, on a ticket or printed form are binding, see *Henderson v. Stevenson*, 2 H.L. Sc. 470; *Zunz v. S.E. Ry.*, L.R. 4 Q.B. 539; *Burke v. S.E. Ry.* (*supra*); *Harris v. G.W. Ry.*, 1 Q.B.D. 515; *Parker v. S.E. Ry.*, 2 C.P.D. 416; *Watkins v. Rymill*, 10 Q.B.D. 178; *Richardson v. Rowntree*, 1894, A.C. 217.

<sup>2</sup> *Hamlin v. G.N. Ry.*, 26 L.J. Ex. 20.

unreasonably and oppressively. The test of reasonableness, as applied to the taking of a special train by the plaintiff, was put in this way by Mellish, L.J. : "Whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York, would take a special train from York to Scarborough at his own cost, in order that he might arrive at Scarborough an hour, or an hour and a half, sooner than he would do if he waited at York for the next ordinary train. This question seems to me to admit of but one answer, namely, that no one but a very exceptionally extravagant person would think of taking a special train under such circumstances."

But the legal effect of the condition stated on the time-tables was also considered in this case. The conditions amounted to saying that, while every attention would be paid to ensure punctuality, no undertaking was given that the trains would start or arrive at the specified times; and that the company would not be answerable for any loss, inconvenience, or injury which might arise from delay or detention. The construction of this condition gave rise to some difference of opinion; but the majority of the judges held, that it imported a contract to use due attention to keep the specified times as far as practicable, having regard to the necessary exigencies of the traffic, and to those circumstances over which the company had no control. Upon this construction, therefore, while the company do not contract themselves out of any liability in respect of unreasonable unpunctuality, the mere fact that a train is late is not sufficient of itself to establish their liability. It must be shown that this was due to some breach of the contract to take every reasonable means to secure punctuality.

The ticket taken by the plaintiff in this case, referred to the conditions in the published time-tables, and this was sufficient to incorporate those conditions into the contract. So also was it held to do in another case, where

Test of what may be reasonably done to remedy the effect of unpunctuality.

Effect of conditions as to unpunctuality: meaning of "every endeavour to ensure punctuality."

Where ticket refers to time-table it incorporates the

conditions contained in the time-table with the contract. the plaintiff was delayed by unpunctuality, and the conditions on the time-tables (to which the ticket referred) stated, that the company would not be answerable for injury arising from delays, unless arising from the wilful misconduct of the company's servants. The plaintiff, on bringing his action for damages, was unable to produce any evidence of wilful misconduct by the company's servants; and he was held, therefore, being bound by the conditions, not entitled to recover.<sup>1</sup>

Misleading time-table: damages recoverable when acting upon it. Where, however, a time-table, which formed part of the contract, gave wrong information, whereby a passenger was induced to take a ticket to Hull from the defendants, when, as a fact, he could not get to Hull by that train, but only as far as Milford Haven; he was held entitled to damages, as upon a false representation upon which he had acted and sustained loss.<sup>2</sup>

No damages for loss of business engagement; but personal inconvenience is a subject of damage. Damages cannot be obtained ordinarily to compensate for the loss of a business engagement, the contract of carriage having no connection with any such circumstance;<sup>3</sup> but personal inconvenience sustained, as where passengers were turned out at night at an intermediate station and had to walk home in the rain some six miles, is a subject of damage. In *Hobbs v. L. & S.W. Ry.*, L.R. 10 Q.B. 111 (which has been discussed (*ante*, p. 32) on the question of remoteness of damage), damages for this personal inconvenience were given; and the actual inconvenience sustained, and whether any real inconvenience has been imposed, are questions of fact dependent upon the special circumstances of each particular case.

Contract by one company to carry goods and passengers. Where two railway companies are connected in business, so that one of them receives goods to be conveyed over the line of the other, there is but one contract; and that is the contract made between the customer and the

<sup>1</sup> *Woodgate v. G.W. Ry.*, 51 L.T. 826.

<sup>2</sup> *Denton v. G.N. Ry.*, 25 L.J.Q.B. 129.

<sup>3</sup> *Hamlin v. G.N. Ry.*, 26 L.J. Ex. 20.

receiving company. Their liability is the same as if they had been the proprietors of the whole of the railways over which the goods are to be conveyed.<sup>1</sup> There is the same liability as regards the conveyance of passengers over different lines, whether the contracting railway passes over another railway line under an agreement to share profits, or merely under running powers. The liability arising out of the contract is to exercise due care in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management. The contracting company are therefore liable, to that extent, to a passenger for injuries he sustains by the negligence of any other company over whose lines the entire journey extends: *Thomas v. Rhymney Ry.*, L.R. 6 Q.B. 266. The Lord Chancellor (Lord Hatherley) laid it down in *Daniel v. Metropolitan Ry.*, L.R. 5 H.L. 45, that if a railway company undertake to carry passengers over their own line, and also over another line, they are bound to see that their own line is in perfect order; and are responsible for any negligence occurring on the other line over which they had contracted to carry passengers, whether under their control or not; but they would not be responsible for matters altogether extraneous to the work in which they are engaged, unless there was reasonable ground for apprehending that extraordinary precautions were necessary.

It was pointed out in the course of *Thomas v. Rhymney Ry.* (*supra*), that while in the conveyance of goods the contracting company, as being insurers, would be liable for any act of negligence by another company; as carriers of passengers they are not insurers, and the contract with the passenger only extends to this: that not only their own line of railway and appliances shall be in a fit and proper condition, but also the line and appliances belonging to other railway companies over which the journey extends. Where, however, the sole act of negligence was

over line  
of another  
company.

Contract  
as to  
passengers  
only  
extends as  
far as  
railway  
manage-  
ment; con-  
tracting  
company  
not liable  
for negli-  
gence of  
another  
company

<sup>1</sup> *Muschamp v. Lancaster & Preston Ry.*, 8 M. & W. 421.



as regards  
matters  
they  
cannot  
control.

that another company's train ran into the plaintiff's train, because the servants of the former negligently disobeyed the signals given by the contracting company's servants; this is an act of negligence on the other company's part which does not relate to the plaintiff's being carried at all, and which is in the nature of some extraneous act altogether beyond the contracting company's control; and the contracting company would, therefore, not be liable. If the accident had occurred through the line of another company being defective, the contracting company could not say that it was not within their control to have had it put into a proper condition; because their contract with their passenger was, that all the lines over which the passenger is to pass in the course of the journey shall be in a fit condition. Where, however, the contracting company has done all in its power, and given the proper signals, the contract does not extend to guaranteeing that another company shall not negligently disregard those signals. This was laid down in *Wright v. Midland Ry.*, L.R. 8 Ex. 135; and it was held that the plaintiff could not recover against the company from whom he had taken his ticket for the whole journey.<sup>1</sup> In addition, however, to the liability undertaken by the company issuing the ticket, there is a liability undertaken by another company over whose lines they permit the ticket-holder to travel, to take due care to make proper provision for his safety. Where a plaintiff, therefore, took a ticket from the South-Western Railway Company to go over lines of the Metropolitan District Company, the latter company, who were the actual carriers of the plaintiff, were held liable to the plaintiff for injuries sustained by him owing to the carriage, in which he was travelling, being unsuited to the platform of the station at which he arrived, and which belonged to the South-Western Railway Company. He would, as appears from that case, also have

Liability  
of com-  
pany over  
whose  
lines the  
ticket-  
holder is  
permitted  
to travel.

<sup>1</sup> And see *Daniel v. Metropolitan Ry.*, L.R. 5 H.L. 45 (*ante*, p. 277).

had a right of action against the South-Western Company : *Foulkes v. Metropolitan District Ry.*, 5 C.P.D. 157.<sup>1</sup> This liability may be founded on tort, or on contract, or on both ; and the principle on which the case was decided shows, that the fact that the District Company actually performed the whole journey is not material ; and the same result would have been arrived at, even if part of the journey only had been carried out by the District Company, and another part by the South-Western Company.<sup>2</sup>

The liability of railway companies, and of the companies over whose lines a ticket-holder travels "at his own risk," is discussed *post*, p. 314.

It sometimes happens that when the liabilities of carriers, as carriers, come to an end, their liability as warehousemen or wharfingers arises. This is a less onerous duty ; warehousemen and wharfingers not being insurers, but responsible only when they have failed to exercise due care.<sup>3</sup> But they must be careful to carry out strictly the terms of their contract. If they do not, and damage thereby arises, even though there be no negligence on their part, they will be liable. A defendant contracted to warehouse some goods for a plaintiff at a particular place. He took them, however, to another place, where, without any negligence on his part, they were destroyed. He was held liable by his breach of contract for the loss of the goods.<sup>4</sup>

It is, sometimes, somewhat difficult to arrive at the precise point of time when the liability of a carrier ceases, and is exchanged for that of a warehouseman, or of an

Liability  
of ware-  
housemen.

When  
carriers  
become  
ware-  
housemen.

<sup>1</sup> See also *Elliott v. Hall*, 15 Q.B.D. 315 (*ante*, p. 58).

<sup>2</sup> As to injury inflicted at a joint station, see *Tebbutt v. Bristol & Exeter Ry.*, L.R. 6 Q.B. 73 (*post*, p. 313).

<sup>3</sup> *Mitchell v. L. & Y. Ry.*, L.R. 10 Q.B. 256. See as to when the contract of carriage is at an end, *Shepherd v. Bristol & Exeter Ry.*, L.R. 3 Ex. 889, decided on special facts, Martin, B., dissenting from the decision of the two other judges who decided the case.

<sup>4</sup> *Lilley v. Doubleday*, 7 Q.B.D. 610.

When  
carriers  
become  
ware-  
housemen  
of goods  
"to be  
left till  
called for."

ordinary bailee for hire. The contract of the carrier extends, not only to carrying the goods, but also to delivering them; and he is entitled to a reasonable time in which to effect delivery. While this time is going on, he remains in the legal position of a carrier, because his contract as a carrier has not yet been fulfilled. But when the carrier is ready to deliver, and the delay in delivering arises from the consignee's fault and not the carrier's, the contract of carriage is at an end, and the position of bailee becomes established. The consignee, also, has a reasonable time allowed him in which to take delivery, and until that time has elapsed, the liability of the carrier as a carrier continues. In both these cases the question of what is a reasonable time either to deliver, or to accept delivery, is a question of fact, which must be decided on the circumstances of the particular case. The consignee cannot, however, for his own convenience, lengthen the period of heavier liability upon the carrier as such, so as to continue to make him liable for any accident to the goods, beyond such reasonable period. This was discussed in a case where goods were sent by carriers to a station, with the direction "to be left till called for," and the question arose how long the carriers, who had accepted these directions, were bound to keep the goods as carriers. There, again, the answer was, they must keep them a reasonable time, and when that has expired, they become bailees for hire, who are only responsible for acts of negligence. Two packages of goods were delivered, one to the Great Western Railway, and the other to the London and North-Western Railway, for carriage to the Wimborne station belonging to the former company. They were addressed to the plaintiff, who was a travelling draper, and whose address was unknown to the companies; and upon the packages was written "to be left till called for." One package arrived at the station on the 24th March, the other on the 25th, and they were placed in the station warehouse. On the

morning of the 27th, the goods up to then not having been called for, a fire accidentally occurred, the warehouse was burned down, and the goods were destroyed. There was here no obligation on the company to give notice of arrival, as there was no one to whom notice could be given; nor was there any undertaking by the company to forward the goods; and it was held, that after the lapse of time since the arrival of the goods, the liability of the companies as common carriers had ceased, and they had become merely warehousemen. Consequently, the actions brought by the plaintiff were not maintainable, in the absence of any evidence of negligence on the defendants' part.<sup>1</sup>

If a person is a common carrier, we have seen that, by a special contract, he may limit his liability; and the effect of such a contract was considered in a case of a furniture-remover in *Scrafe v. Farrant*, L.R. 10 Ex. 358. There was a special contract here upon letters which passed between the plaintiff and the defendant; the latter undertaking to remove the plaintiff's furniture from Paignton to Plymouth, he "undertaking risk of breakages (if any) not exceeding £5 on any article." The van, with the furniture in it, was burnt, without any negligence on the defendant's part; and the plaintiff having brought an action against him for the loss, contended that the defendant was liable as a common carrier. It was held that the special contract showed that the parties intended to limit the defendant's liability to loss by breakage, or loss incurred by the defendant's negligence, and excluded any question of liability as a common carrier. The defendant not having been guilty of any negligence, the plaintiff was, therefore, not entitled to recover damages for the loss he had sustained. The contract, it was held, did not exclude liability for any damage which might result from want of due care on the part of the defendant or his servants; but the effect

Liability  
of fur-  
niture-  
remover  
under a  
special  
contract.

<sup>1</sup> *Chapman v. G. W. Ry.*, 5 Q.B.D. 278.

When a carrier is a common carrier.

was, except as to this, to limit the defendant's liability to breakages only; whereas it may probably have been the defendant's intention to increase, rather than to diminish, the plaintiff's liability. There was also a question, which it was unnecessary to decide, whether the defendant was a common carrier; some of the judges thinking he was not, as he only held himself out to carry under special contracts, and others preferring to leave the question untouched.

In the *Liver Alkali Co. v. Johnson*, L.R. 9 Ex. 338, the circumstances were such as to make the defendant a common carrier. In that case, the defendant was a barge-owner, and let out his vessels for the carriage of goods to any one who applied to him. Each voyage was made under a separate agreement, and a barge was only let to one person for the same voyage. He did not ply between any fixed termini, but the hirer in each case fixed the points of departure and of arrival. In an action against him for not safely and securely carrying certain goods, it was held on this state of facts (Brett, J., dissenting), that the defendant had incurred the liability of a common carrier, and was liable; though the goods were lost without negligence on his part. But Brett, J., though he did not agree that the defendant was a common carrier, still held him liable; as by custom, a shipowner who carries goods for hire in his ship, undertakes to carry them at his absolute risk, the act of God or of the king's enemies excepted; unless he limits his liability by further exceptions contained in his agreement. In *Scaife's case* the judges who dealt with the question whether the defendant was a common carrier, considered the facts of that case differed importantly from those of the *Liver Alkali case*. In that case, the express agreement was taken by the Court to mean nothing more than that the barges did not go about plying for hire, but were waiting for hire by any one; while in *Scaife's case*, the mode of dealing, as stated in the defendant's advertisements, necessarily involved, it

Distinction in *Scaife's case*.

was considered, a special contract in each case applicable to one journey only ; which was thought to constitute a very distinguishable ground.

However, whether a shipowner be a common carrier or not, it has been held that in every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy.<sup>1</sup> But if damage occurs during the voyage through negligence of the crew, and is not due to any defect arising before the departure of the ship, shipowners would be protected under a special clause exempting them from liability for the negligence or default of their servants.<sup>2</sup>

<sup>1</sup> *Kopitoff v. Wilson*, 1 Q.B.D. 377 ; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72 ; *Tuttersall v. National Steamship Co.*, 12 Q.B.D. 297.

<sup>2</sup> *The United Service*, 8 P.D. 56 ; 9 P.D. 3. And see *Price v. Union Lighterage Co.* (*ante*, p. 261).

## CHAPTER XXII.

### *Negligence of railway companies (continued)—“Invitation to alight.”*

When questions of fact ought and ought not to be left to the jury.

THE extreme difficulty of deciding when evidence purporting to show negligence ought to be left to the jury for them to deal with, and when this evidence ought to be withdrawn from their consideration; or, in other words, whether there is any evidence of negligence to go to the jury, becomes nowhere more acute than in actions for negligence against railway companies. It is not only impossible to lay down any rule by which this question can be determined, but, sometimes, it also appears nearly as impossible to understand, why a question entirely of fact has been withdrawn from the jury. The question whether a railway company have provided reasonable facilities to enable passengers safely to alight at a station, coupled with the further question whether, under the particular circumstances, the company have so acted as to induce a reasonable belief in the passenger's mind that he is intended by them to alight, is essentially a question of fact. But, under the name of “invitation to alight,” it has almost been treated as a doctrine of law.

*Siner's case discussed; is it still a decision of authority?*

The first case on this point, we shall notice, is that of *Siner v. G.W. Ry.*, L.R. 4 Ex. 117, decided in 1869; and it is to be observed that the accident for which the plaintiff claimed damages, occurred in the daytime, and in full daylight. The plaintiff travelled from West Bromwich to Rhyl, and arrived there in daylight. The train was too long for the platform, and the engine, with a

few of the front carriages, overshot it. The only way of alighting at that place was either by jumping from the step to the ground, a distance of three feet, or by making use of the narrow footboard running underneath the step, halfway between the step and the ground. The latter mode would have necessitated clambering out sideways, instead of stepping down in front in the usual way. Upon drawing up in this way at Rhyl, passengers were not warned to keep their seats, and it was proved that there were no porters on the platform. The plaintiff and her husband swore that the place was awkward and dangerous for descending. They waited some time after the train came to a standstill; and after seeing others get down, the plaintiff's husband got down, and then the plaintiff (with her husband's assistance) jumped down, and strained her knee in doing so. The train was not backed, and after stopping at Rhyl, proceeded at once on its onward journey to Bangor.

The learned judge who tried the case (Keating, J.) held that there was evidence to go to the jury, that the defendants intended passengers in the carriages beyond the platform to get out at that place. He told the jury, that the defendants were bound to provide reasonable and proper means for passengers to alight, and he asked them whether the defendants had done so, and whether under all the circumstances it was a reasonable and proper thing for the plaintiff to have got out of the carriage as she did. They found a verdict for the plaintiff; and a rule was obtained to enter a non-suit, on the ground that there was no evidence of negligence to go to the jury; or for a new trial, on the ground that the verdict was against the weight of evidence. This rule was argued before the Court of Exchequer,<sup>1</sup> and it was held by all the judges, except Kelly, C.B., that there was no evidence to go to the jury of negligence in the defendants; and that the

<sup>1</sup> L.R. 3 Ex. 150.



accident was entirely the result of the plaintiff's own acts. In examining the judgments, it is difficult to avoid the conclusion, that the decision that there was no evidence to go to the jury, took away from the jury the determination of every question of fact which it is generally understood to be the province of the jury to decide. A decision that the verdict was against the weight of evidence would have been a different matter; but to hold that there was no evidence whatever of negligence, so as to raise any question which could be put before the jury, does certainly make it appear that the judges usurped the province of the jury, and made themselves the judges of the facts. Let us examine these judgments. The judges held that the place was not dangerous. "The witnesses say it was dangerous, but they are not experts," said Bramwell, B. On the question whether the place was dangerous, the witnesses having deposed that it was, and the description of the means of alighting provided being before them, how can there be no evidence on this point to go to the jury? And how could the fact that the witnesses were not experts, not merely affect the value of their evidence, but destroy it so entirely as to wipe it out altogether? What sort of experts ought they to have been, to have given proper weight to their testimony? Expert railway travellers, expert assessors of what is or what is not dangerous, or expert scientific persons? But there was no contrary evidence, "expert" or otherwise. It seems a strong proposition to say that, in the absence of any contrary evidence, evidence based upon facts open to the observation of a witness, even though it partakes of the nature of an opinion, is to be utterly rejected because he is not "an expert." But the learned judges also discussed the case on the assumption that the place was dangerous. "On the assumption that the place was dangerous, it is suggested that they (the defendants) should have had some one in attendance to warn the passengers not to descend. But why so?" asked

The  
judgments  
examined.

Piggott, B. Certainly, if a passenger was not told or invited to descend at the dangerous place, there would be no necessity to warn him of the danger. But the question whether the company had so acted as to induce the reasonable belief in the passenger's mind that he was invited to descend at the dangerous place, was one for the jury, and we shall see in a moment what that evidence was. If, however, the company had so acted, one might indeed ask, why should they not take reasonable precautions to protect the passenger by warning him, or otherwise guarding him against the danger? How can it be said that if the company, in bringing me to my destination, ask me to alight at a dangerous place, there is no duty on them to make reasonable provisions for my doing so safely? The argument of Bramwell, B., also on the assumption that danger existed, and that the company had not performed their duty of providing a fit and proper place for alighting, appears to exclude the uncontradicted evidence that there was no servant of the defendants to whom the plaintiff could have made a request to back the carriage. "Where is the evidence," he asked, "that the plaintiff ever made any request to the defendants to put back into the station, or, if time had been given them, they would not have done so?" He then proceeded to infer that the passengers "scrambled out" without waiting for any notice to descend. To tell the plaintiff that she must ask some one to put back into the station, when the evidence was that there was no one there to ask, appears to be somewhat irresponsible; and to "infer" that the plaintiff "scrambled out," when the evidence was that she only alighted after seeing other passengers descend, and after she had waited some time after the train had come to a standstill, would appear to be drawing an inference not warranted by the facts. Kelly, C.B., the dissentient judge, also pointed out as to this, that so far from it being the plaintiff's duty to ask the defendants to back the train, it was their duty

to do so if there was any danger (which Bramwell, B., was assuming there was), and to give the passengers notice not to descend.

As to whether what took place amounted to an invitation to alight, that must be a question for the jury in each particular case; and on that point, Kelly, C.B., expressed himself as follows: "That raises the question whether, if the company stop their trains at a station, and no intimation is given that the passengers are to keep their seats, it is not in fact an invitation to them to get out. If there were any doubt on that point, the evidence in the present case shows clearly that it was the intention of the company, and part of their arrangements, that passengers in that part of the train which overshot the platform should there and then alight. After the train had once stopped, it never backed or moved until it started for Bangor. Not only, therefore, was there evidence for the jury, but no jury could doubt that all passengers in those carriages . . . were intended to get out there and then; but if there was any doubt on this part of the case, the question was left to the jury, and they have found for the plaintiffs."

Kelly, C.B., also expressed the view, which was adopted by the judges in the Exchequer Chamber, that a railway company are not entitled to expose a passenger to the necessity of choosing between the two alternatives, either of getting out, taking his chance of danger; or to be taken on past his destination to another station. Subject, however, to this, that if the danger is obvious, the passenger is not entitled to choose an obvious and certainly dangerous alternative. "Yet when he is called upon to choose between two evils to which the neglect of the company has exposed him, and one of which presents some degree of danger, but not such as he may not without imprudence encounter, if in consequence of his adopting that alternative he suffers any injury, that injury is the proper subject of an action against the company." Bramwell, B.,

was, however, of opinion that if the place was dangerous, the plaintiff should have stayed in the carriage. But the Court came to the conclusion that the accident arose entirely from the plaintiff's own act in jumping down from the carriage; and in this they were supported by the Exchequer Chamber, there again being one dissentient judge—Keating, J.—who, as the judge who had presided at the trial, had seen and heard the witnesses. It is certainly curious that the judges who formed the majority in the Exchequer Chamber also insisted that the plaintiff should have requested the defendants to back the train, when there was, according to the evidence, no opportunity afforded her of making such request to any one. Hannen, J., said: "I think juries take an exaggerated view of the duties of railway companies. The companies have done so much for the comfort and convenience of travellers, that it is now made the subject of complaint if the highest degree of luxurious care is not attained in all their arrangements." This remark was made in 1869, and appears to-day to be rather time-worn. But he went on to say that platforms were then so usual, that he had no doubt that it would be negligence to bring a train to a stop in such circumstances as would lead a person to expect that there was a platform. Here, perhaps, lies the real ground of the decision, in that you cannot be led into thinking there is a platform, when you can clearly see for yourself that there is none. "But if it is daylight, and the passenger can see that there is no platform, then he must inquire whether there are not other means of alighting." She could not inquire when there was no one to inquire from. But the judge thought that the means provided by the footboard for alighting were reasonable means; "and I think it lay upon the plaintiff to show more special reason why it was dangerous or impossible to use the footboard, so as to make it negligent on the part of the company not to provide some other means of alighting."

It might, perhaps, be urged that in accepting the evidence that the mode of alighting provided in this instance was a dangerous one, the jury had acted against the weight of the evidence the circumstances afforded; though it was shown to be an unusual mode, and less convenient than that commonly afforded. Can it, however, be said that there was no evidence upon which they could arrive at the conclusion that it was dangerous? "If, by the accident of excessive length, a train overshoots a station," said Keating, J., "the railway company should take some precautions either to ensure facilities to the passengers to alight, or else to inform them that after an interval the train will back into the station. In this case the company did neither the one nor the other. There were no special facilities afforded, and no notice that any change of position was intended. This being so, the plaintiff, after in vain looking for a porter, and finding the time was running on, and that some of their fellow-passengers had descended safely, resolved to follow their example."

The fact that other passengers had been allowed to descend, and had done so safely, may have induced the plaintiff to believe that it was also safe for her to descend there; but whether the place was dangerous or not, the majority of the judges, as already observed, came to the conclusion that the accident was the plaintiff's own fault. The evidence was that she got out carefully; and the fact that others had safely descended at the same place, while giving weight to the contention that she may herself have been careless, could hardly be said to operate so as to withdraw from the jury's consideration the question of fact, whether she had entirely brought the accident upon herself by her own want of care.

*Siner's case*, however, on the whole, shows that it is the duty of a railway company to provide reasonable accommodation to enable their passengers to alight safely; a proposition more firmly laid down in subsequent cases.

*Cockle v. S.E. Ry.*, L.R. 7 C.P. 321, which occurred in 1872, presents the case of an accident of this kind happening at night, and in the dark. The plaintiff arrived at his destination one night, and when the train drew up at his station, the carriage in which he rode was opposite to a part of the platform which receded from the rails, and was about four feet from the carriage. His was the only carriage which was not drawn up flush with the platform, and the whole train might have been so drawn up. The night was very dark, and the place where his carriage stopped was not lighted, though the other parts of the station were well lighted. There was no express invitation to alight; but the train had been brought to a final standstill, and did not move on again until it started on its onward journey. No warning was given to the plaintiff by any of the company's servants that the platform was not close to his carriage, or that he must be careful in alighting. What happened under these circumstances was, that the plaintiff opened the door of the carriage and, in stepping out, fell into the space between the carriage and the platform, and injured himself. At the trial the jury found a verdict for the plaintiff; and leave was reserved to the defendants to move to enter a non-suit, on the ground that there was no evidence to go to the jury. The rule was argued before the Court of Common Pleas,<sup>1</sup> with the result that the judges were equally divided. Keating, J., thought himself bound by previous decisions to hold that there was no invitation to alight; and, further, he thought that there was no evidence that the construction of the platform was improper; and Montague Smith, J., also held that there was no invitation to alight; and also that the plaintiff was precluded from recovering, because she had contributed to the accident by her own negligence; because, as there was no invitation to alight, she alighted at her own risk, and imprudently. Brett, J., and Bovill, C.J., took a contrary

<sup>1</sup> L.R. 5 C.P. 457.

view; the former learned judge holding that it was impossible to say there was no evidence to go to the jury, either that the defendants had been negligent, or that the plaintiff had not been. Bovill, C.J., discussed the question, What is an invitation to alight? and his remarks are instructive. "In some cases," he said, "the question has been raised as a question of law, whether the calling out of the name of a station amounts to an invitation to the passengers to alight; but it seems to me that it may or may not amount to such an invitation according to the time at which it takes place, the position of the train, and the nature of the station; if the name is called out while the train is in motion, that clearly does not amount to an invitation to alight; if the train has been brought to a standstill, and the porters pass from carriage to carriage, calling out the name of the station, that might be an invitation to the passenger to get out. I think it should be decided by a jury to which class each case belongs, taking into consideration all the facts connected with it. In the same way, I think there may be circumstances under which the mere stopping of the train may amount to an invitation to the passenger to alight, while there are other cases in which it would not." Then, after giving illustrations of both of these cases, such as a train stopping at a station or terminus, and stopping not at a station, he proceeds to ask, with reference to whether the facts indicate an invitation to alight: "Who is to determine whether it does so or not? It seems to me it must be determined by the jury. . . . I think the jury are the right persons to judge. In short, it seems to me impossible to say, as a matter of law, that either the stopping of a train, or the calling out the name of the station, may not be an invitation to alight."

The case came, on appeal by the defendants, before the Exchequer Chamber, and it was held by that Court that the plaintiff's verdict could not be disturbed; and it was also held, that bringing up a train to a final standstill, for the

purpose of passengers' alighting, amounts to an invitation to alight; at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he wished to alight at that station. It was also held, that bringing up a carriage to a place at which it is unsafe for a passenger to alight, under circumstances which warrant him in believing that it is intended he shall get out, and that he may, therefore, do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, at least in the absence of contributory negligence by the passenger, an action may be maintained.

It was in this case considered to be a proper question for the jury, whether the place at which the carriage drew up, was or was not dangerous for the purpose of alighting. But it is to be noted that in this case the danger was neither visible nor apparent; the place was dark, and the plaintiff was by the conduct of the company induced to believe that he would be able safely to step out directly on to the platform, when as a matter of fact there was no platform within some feet of his carriage. In the course of the judgment of the Court, which was delivered by Cockburn, C.J., he referred to the decision in the case of *Praeger v. Bristol & Exeter Ry.*, reported in 24 L.T. (n.s.) 105, to which he was a party, and cited passages from his judgment in that case. With regard to a passenger being placed in a position of danger which is apparent to him, a point directly bearing on *Siner's case*, he said as follows: "I agree that if it be daylight, a man being bound to use his eyesight, if the passenger sees that the carriage is not in the ordinary position with reference to the platform, he must not complain if, there being no actual danger, he has to use a little more care than usual in getting out. If the position be such that there is some extraordinary difficulty or danger, he must consider what he will do. He may call to the servants of the company to bring the carriage

*Siner's case* weakened by observations of Cockburn, C.J., and by the decision in *Robson's case* (post, p. 299).



into its proper position ; but there may be circumstances in which it is impossible to make such an application, or he may have no opportunity of making it"—which the evidence showed was the case in *Siner's case*—"or the application may be refused. *Under such circumstances as these, I am far from saying that he might not have a right of action if he suffered injury while so alighting.*" As the judgment in *Cockle's case*, which contained this extract, was the judgment of four other judges as well as that of Cockburn, C.J., it cannot but be, that that expression of opinion must carry considerable weight, if *Siner's case* has ever to be authoritatively reviewed. But the authority of *Siner's case* was more particularly assailed by the decision in *Robson v. N.E. Ry.*, 2 Q.B.D. 85 (*post*, p. 299).

*Hellawell's case*: invitation to alight when train not actually stopped. Plaintiff led to believe by the action of the company's servants that she was then to alight.

In the same year (1872) another case came up for decision where the facts were of a different kind, for the train had not actually come to a standstill when the accident happened to the plaintiff; but the question whether what happened amounted to an invitation to alight, was there treated as a question of fact. This was the case of *Hellawell v. L. & N.W. Ry.*, 26 L.T. (*n.s.*) 557. The plaintiff was an elderly lady, who arrived by the defendants' railway at Huddersfield one evening in June about 8 p.m. On arrival at the station, several porters ran up to the train before it stopped, and threw open the doors, and called out, "All out for Huddersfield." There was great confusion at the station, and many people were crowding up to get into the train. The plaintiff, thinking the train had come to a stand, began to get out, and placed one foot on the step of the carriage. When she was in this position, the brake, which had been applied to stop the train, was suddenly taken off. The effect was to increase the speed of the train, and the plaintiff fell off the step on to the platform, and broke her leg. The County Court judge put specific questions to the jury, who returned a verdict for

the plaintiff. It was reviewed by Martin and Piggott, BB., the appellants contending that there was no evidence of negligence on their part. It was held that there was ample evidence of negligence. Here the question, what was intended by the company's servants opening the doors and calling out, "All out for Huddersfield," was treated as a question of fact for the jury; and it was a reasonable conclusion that it constituted a direct intimation to the passengers that they were then to alight. Moreover, the sudden taking off of the brake while the plaintiff was getting out, so that the speed of the train was increased, was thought by the judges to be in itself an act of negligence. The acts of the company's servants induced the belief, which the jury were entitled to say was a reasonable one, that passengers were there and then intended to alight.

Another case (decided in 1873) was a peculiar one; but in *Lewis's case*. the course of it, the judges held clearly that the mere calling out of the name of a station is not in itself an invitation to alight; there must be something more—a reasonable belief, induced by the acts of the company, that the train had come to a final standstill. This was the case of *Lewis v. L. & C.D. Ry.*, L.R. 9 Q.B. 66. The plaintiff was a woman well acquainted with the Bromley station, at which she arrived by the defendants' railway one October evening after 7 p.m. On entering the station, its name was called out by the porters, and the carriage in which she was, overshot the platform, waited in that position only for a few seconds, and then backed to the platform. In the interval, the plaintiff was in the act of getting out of the carriage, when the jerk caused by the train moving back caused her to fall, and she was injured. She was not successful in maintaining her action. The conclusion arrived at by the County Court judge who tried the case was, that there was no evidence of negligence by the defendants. On appeal to the Court of Queen's Bench, this judgment was upheld,

the inference from the facts being, that she was not induced by anything the company had done, to believe that she might descend when she did; but on the contrary, with her knowledge of the station, she must have known that it was not intended that she should get out at the place where her carriage stopped; and that the train would be backed to the platform, as in fact it was only a few seconds after it had first stopped. The case was one of very special facts, and has no great importance, except for the expression of opinion as to the effect of calling out the name of a station, which has already been noticed.

*Bridges' case shows remarkable difference of opinion amongst the judges.*

*The facts of the case.*

Then came *Bridges v. North London Ry.*, decided in the House of Lords in 1874, in which, after having heard the unanimous opinion of five judges who were called upon to advise the House, a unanimous decision was arrived at upon a question which, in the Courts below, had developed a remarkable difference of opinion amongst the judges.

The facts were as follows: Mr. Bridges was one winter's night in a train which arrived at Highbury station, which was his destination. He was in the last carriage of the train. The train only partially went up to the main platform, leaving the last two carriages in a tunnel which was not lighted and was full of steam. Opposite the last carriage within the tunnel, was a mass of hard rubbish lying by the side of the rails; opposite the last carriage but one, there was also a narrow platform. The name of the station was called out, and the train came to a standstill, and remained stationary for a considerable time. Mr. Bridges got out, fell, and received injuries from which he died. After he had descended, "Keep your seats" was called out, and the train moved up. Blackburn, J., who tried the case, directed a non-suit, holding that there was no evidence of negligence; a decision of law which evoked so strong an expression of dissent by the jury, that he took their finding as to the amount of damages, on the assumption that there ought to be a verdict for the

plaintiff. The course of the proceedings shows how little, up to this time, the question as to negligence arising from an invitation to alight had been generally understood by the judges. Upon the non-suit, directed by Blackburn, J., coming before the Court of Queen's Bench to be reviewed, four judges upheld the non-suit, although one of them expressed doubts about it. When it came before the Exchequer Chamber, four judges thought the non-suit was right, and that there was no evidence to go to the jury; and three disagreed with that view. The House of Lords, however, following the unanimous opinion of the five judges consulted, were unanimous in holding that there was evidence to go to the jury, and that the non-suit therefore was wrong, and they had no doubt about it. "The train having stopped a sufficient length of time to enable these two passengers to get out, and it not having been established in any way that the cry 'Keep your seats' was made before these passengers got out, I say, in this state of circumstances, I think it would be very strong to say that there was not evidence to go to the jury in this case." So said Lord Hatherley; and it may be remarked that to say a statement is "very strong," means that it is very wrong; it is a judge's euphemism. The Lord Chancellor (Lord Cairns) declined to lay down any positive rule of law as to what the effect may be of calling out the name of a station, and adopted a similar line of reasoning to that of Bovill, C.J., in *Cockle's case* (*ante*, p. 291), and of the Court in *Lewis's case* (*ante*, p. 295). Lord Hatherley concurred in these observations of the Lord Chancellor, and added: "I cannot help observing, that when the name of a station has been called out, accompanied by a stoppage, and a considerable interval has elapsed, there is a certain amount of evidence to go to the jury to authorize the finding of a verdict for the plaintiff, unless some explanation could be given of the facts by the defendants, instead of their merely submitting that the plaintiff had

not produced sufficient evidence to call upon them for a defence."

So greatly had the idea gained ground that this essential question of fact was a question of law, that *Bridges' case* was misunderstood by the judges (as is pointed out, *ante*, p. 135), as laying down that whether negligence can be inferred from the facts, is itself a question of fact, and not one of law; a misapprehension which was corrected in *Jackson v. Metropolitan Ry.*, 3 App. Cas. 193 (*post*, p. 304).

But *Bridges' case* made it evident that in these kind of cases, and upon similar facts, it should be left to the jury to say whether a passenger had acted reasonably, rather than to allow the judge to decide that question; and the difference in the two distinct views hitherto adopted by the judges; one set thinking that these cases should be withdrawn from a jury, and the other set, that the jury was the fitting tribunal to decide them, was terminated in favour of the latter view. But, none the less, the rule that it is for the judge to say whether there is reasonable evidence of negligence for the jury to take into consideration, has in no way been weakened.

*Weller's  
case.*

The case of *Weller v. L.B. & S.C. Ry.*, L.R. 9 C.P. 126, decided also in 1874, but before the judgment of the House of Lords in *Bridges' case*, was a very similar case to the last. It was night, the name of the station had been called out, the train was brought to a standstill, and the carriage in which the plaintiff was had overshot the platform. There was no light near the spot, and no warning was given, nor was there anything to indicate that the train would be backed on to the platform. The plaintiff, having heard carriage doors opening and shutting, and having seen other people get out, himself descended, fell, and was injured. Under these circumstances, Bovill, C.J., who tried the case, directed a non-suit to be entered, on the ground that there was no evidence of negligence by the defendants

to go to the jury. This decision came up for review before Brett, Denman, and Honyman, JJ., who unanimously reversed this decision, and held that there was evidence for the jury, both of negligence on the defendants' part, and of the absence of contributory negligence on the plaintiff's part. Brett, J., who was one of the judges whose opinion was taken by the House of Lords in *Bridges' case*, said: "To call out the name of a station before the train has come to a standstill, is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But, if the porter has called out the name of the station, and the engine-driver has overshot the platform, and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events, the jury may from these facts infer negligence." So, too, under these circumstances, the jury, he thought, might properly say that a passenger showed no want of reasonable care if he got out of the carriage. The judges had no difficulty in distinguishing the facts of this case from the peculiar circumstances of *Lewis's case* (*ante*, p. 295).

There must be something more than calling out the name of the station and overshooting the platform to constitute negligence by the company.

*Robson v. N.E. Ry.*, 2 Q.B.D. 85, was a case which in its facts presented no real distinction from the facts in *Siner's case*. A train drew up at a small station on the defendants' line, with the engine and part of one of the carriages beyond the platform. The plaintiff, a woman, was in that carriage. She had a parcel in one of her hands, and her right hand was free when, on the train stopping, she opened the carriage door and stood on the step of the carriage. There she waited some time for assistance. There was only a station-master at the station, and she saw him taking out and putting luggage into the van. Finding that no one came to assist her, and fearing that the train would move on, she tried to alight by getting on to the footboard, and in doing so fell, and injured

*Robson's case*, where the plaintiff succeeded upon facts hardly distinguishable from those of *Siner's case*.

herself. The judge who tried the case (Archibald, J.) non-suited her, on the ground that there was no evidence of the defendants' negligence. This was before the judgment of the House of Lords in *Bridges' case*. A rule was obtained and was argued, after *Bridges' case* in the House of Lords, before Blackburn and Field, JJ., who set aside the non-suit, and directed a verdict to be entered for the plaintiff. This decision came up for review by the Court of Appeal before Coleridge, C.J., Mellish and Brett, L.JJ., and the judgment of the Court below was affirmed. This was a case, as *Siner's* was, where such danger as there was, was open and visible. Coleridge, C.J., and Mellish, L.J., distinguished *Siner's case* on grounds which need not be referred to, as they hardly go to substantiate any real distinction. Brett, L.J., however, did not attempt to do so, and delivered himself as follows: "It appears to me that the judgment of the House of Lords in *Bridges' case* puts an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for a passenger to do. The House of Lords held, that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide. *Siner's case* was decided in the heat of the controversy, and without saying that it ought to be overruled, I may say that it was decided by judges who thought that these cases ought to be left to the judge, and not to the jury. The House of Lords has decided that they are to be left to the jury, and the judgment of the Queen's Bench in this case is put on this ground, that the passenger did remain so long that she might reasonably suppose that if she did not get down she would be carried on, and, unless there was danger to her life, she was justified in getting down. The jury were entitled to say whether on such

facts there was negligence on the part of the company."<sup>1</sup> It will be seen that the jury in *Siner's case* had found a very similar state of facts, but that the majority of the judges in that case rejected this finding, and themselves found the facts differently. Where *Siner's case* is distinguished, it is upon the facts as found, not by the jury, but by the judges, who, upon evidence very similar to that of *Robson's case*, arrived at conclusions of fact opposite to those which were held to be reasonably justifiable in *Robson's case*.

A case which was decided in the Court of Appeal in 1876, very shortly after the decision in *Robson's case*, introduced a fresh point of fact. This was the case of *Rose v. N.E. Ry.*, 2 Ex. D. 248. The facts were very similar to those of *Robson's case*; but there was the additional circumstance that, on the train overshooting the platform, the porters called out "Keep your seats." The plaintiff, however, and those in the carriage with her, did not hear this. And, moreover, as the train was not in fact backed, to have kept one's seat would only have resulted in the passengers being carried on to the next station. Here, the judges of the Exchequer Division held that there was no negligence on the defendants' part. This decision was overruled by the Court of Appeal, on the ground that, having overshot the platform, it was the duty of the company to do something to ensure the safety of those who were in the carriages which were beyond the platform. Here nothing was done; the train was not backed; the passengers were not assisted; and the company had not performed the duty imposed upon them. It was also said that *Robson's case* more than covered this case. Still, it must always be remembered that in this class of case, each particular one depends upon its own circumstances.

*Rose's case*, where plaintiff succeeded, though "keep your seats" had been called out, which, however, she did not hear.

The case of *Foulkes v. Metropolitan District Ry.*, *Foulke's case*: the platform 5 C.P.D. 157, which has been referred to on another point

<sup>1</sup> See also the remarks of Fry, L.J., in *Simkin's case*, 21 Q.B.D. at p. 460 (*ante*, p. 7).



must be  
suited to  
the car-  
riage to  
provide  
safe  
means of  
alighting.

(*ante*, p. 65), shows also that it is the duty of a railway company, when they have accepted some one as a passenger, not only to carry him safely, but also to provide safe means for his alighting on arrival at his station; and where an accident was sustained, by reason of the carriage in which the plaintiff was travelling being unsuited to the platform of the station at which he alighted, he was held entitled to recover damages from the company for an injury he thereby sustained.

The  
province  
of the  
judge and  
of the  
jury as  
enunci-  
ated by  
the House  
of Lords.

Two clear intimations as to the province of the judge, and of the jury, have been stated by the House of Lords. One, that whether there is reasonable evidence to be left to the jury of negligence is a question for the judge; while it is for the jury to say whether, and how far, the evidence is to be believed.<sup>1</sup> It is obvious that the judge, in determining that question, must often come into conflict with the opinions taken by other judges of the same facts, as may be sufficiently seen from the cases we have been reviewing.

The other direction is, that where there is conflicting evidence on a question of fact, whatever the judge's opinion may be of the value of that evidence, he must leave it to the jury for their decision.<sup>2</sup>

The  
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When it is considered that the judge, in determining whether there is reasonable evidence of negligence, has, while applying the rules of law, also to deal with questions of fact, or perhaps, more precisely, to consider as a fact what reasonable inferences of fact may be drawn from the evidence, it cannot be considered remarkable that the striking differences of opinion arise which are manifested in the cases we have been considering. Facts, and the deductions to be made from them, constantly strike different minds in different ways. The point of view, or,

<sup>1</sup> *Jackson v. Metropolitan Ry.*, 3 App. Cas. 193 (*post*, p. 304).

<sup>2</sup> *Dublin, Wicklow, etc., Ry. v. Slattery*, 3 App. Cas. 1155 (*ante*, p. 137).

as Brett, L.J., seemed to consider, even the particular school of thought to which a judge belongs, must inevitably affect his appreciation of the trend of facts, just as his view must also be coloured by his conception of the applicability of the rule of law he is called upon to apply. The extreme difficulty of drawing a distinct line between circumstances where negligence may be inferred, which is all that concerns the judge; and circumstances where negligence ought to be inferred, which concerns the jury alone, great as it is in itself, is enhanced unconsciously by the habit of mind, so to speak, of the judge. In determining whether negligence may be reasonably inferred from the facts in evidence before him, the judge has to place himself in the position, neither more nor less, of a reasonable man; and the circumstances are infinite where reasonable men may reasonably come to precisely opposite conclusions. No fixed and definite rule can be applied so as to make only one decision possible to a reasonable man on a given state of facts; and finality is only reached when we come to the House of Lords; and that is, because by the machinery of our legal system we cannot go any further.

## CHAPTER XXIII.

*Liabilities and duties of railway companies further considered—Overcrowding—Care of the company's premises—Passengers travelling "at own risk"—Goods carried "at owner's risk"—Fire by sparks from engines.*

Difficulty of applying rule that the injury sustained must be connected with the alleged act of negligence.

*Jackson's case* considered.

IT has already been pointed out that *Wakelin's case* (*ante*, p. 104) is an illustration of the sufficiently obvious rule, that the injury complained of must be connected with the alleged act of negligence, in order to make an action sustainable. In that case, from the nature of the circumstances, no evidence was available to connect the accident with any definite act of negligence; the only evidence leaving it a matter of speculation whether there was negligence or not; but the application of this rule to available facts, obvious as its operation would appear to be, is not without difficulty. The facts of *Jackson v. Metropolitan Ry.* (*ante*, p. 302) show this. The plaintiff's carriage was full, and remained so when they pulled up at Gower Street station. There, three persons forced themselves in, there being a great demand for seats, and were obliged to stand up in the carriage. At the Portland Road station there was again a great rush of passengers, and the door of the plaintiff's carriage was opened by some one, who, seeing it full, shut the door. Then other persons came up, opened the door, and tried to get into the carriage. The plaintiff rose from his seat to prevent them. While he was standing up with his hands and arms extended, the train moved on, a porter turned away

the persons who were trying to get in, and hastily shut the door. The plaintiff feeling that the train was moving on, had placed his hand on the lintel of the door to save himself from falling; and it was just at that moment that the porter slammed the door, and the plaintiff's thumb was caught in it and crushed. The plaintiff brought his action for damages against the company, basing his claim on their negligence in not having an adequate staff to deal with the crowd of passengers, and on the "slamming" of the door by the porter. It was contended that the injury to the plaintiff was the natural result of all the combined circumstances. There was no evidence that any complaint had been made to the officials either at Gower Street or at Portland Road. Brett, J., who tried the case (in 1873), held that there was evidence of negligence to go to the jury, and they found a verdict for the plaintiff. A rule was obtained to set aside the verdict, which was discharged by the Court of Common Pleas; Coleridge, C.J., Brett, J., and Grove, J., holding that, though taken singly, the several circumstances might not have been sufficient to charge the defendants with negligence, yet together they showed a careless and improper mode of conducting the business of the company, from which the jury might fairly find them guilty of negligence which conduced to the injury. On appeal to the Court of Appeal, the judges were equally divided, and the judgment of the Court below accordingly stood affirmed. On coming before the House of Lords, this judgment was unanimously reversed. It was pointed out by the Lord Chancellor (Lord Cairns) that, though there was negligence in the company in allowing too many passengers to get in at Gower Street, and possibly also in not removing the three extra passengers at Portland Road; yet this negligence did not connect itself with the accident which actually occurred. There was no evidence given to show that, on leaving Portland Road, the overcrowding had any effect on the plaintiff's

movements, so as to make him less master of his movements than otherwise he would have been when he stood up, or when he fell forward; and there was nothing to show that the overcrowding produced, or was in any way connected with, the fact that the plaintiff got his thumb caught in the door—there being nothing improper in the shutting of the door by the porter. This case was no doubt a difficult one, but it shows very clearly that the mere fact of negligence having occurred, and of an accident having happened, cannot support an action, unless the accident can properly be attributed to that act of negligence as the cause which produced it. It also shows the difficulty that may be experienced in applying that rule to the facts of a case. The opinions of the judges below may have been based on the view that, as it was negligence to allow the overcrowding, and as it was the duty of the company themselves to see that there was no overcrowding, what the plaintiff did, was only in furtherance of an act which it was the duty of the company towards the plaintiff to have themselves performed for him; and that meeting with an accident, in the course of doing what the defendants ought to have done, his injury was sufficiently connected with their negligence to give him a good cause of action. But the evidence showed, that the attempt made by other persons at Portland Street to get into the plaintiff's already overcrowded carriage, was in fact frustrated by the porter who pushed the persons away; and therefore, even in this view, the plaintiff was premature in the action he took, and the defendants' negligence did not make it necessary for him to act as he had done. And the fact that three other persons were standing up in his carriage unable to find seats, though it may have been negligence to permit them to remain there, did not in any way conduce to the plaintiff's getting his thumb crushed in the door.<sup>1</sup> When

<sup>1</sup> For other cases where a plaintiff's fingers were crushed, both on

a passenger who is seated in a railway carriage in the course of a journey, not in the act of entering the train, nor of alighting from it, gets his fingers crushed owing to the shutting of the carriage door by a railway servant on the platform, this does not form any evidence of negligence on the part of the company. There is no duty cast upon the servants of the company to give warning of the shutting of the carriage doors to a passenger so situated.<sup>1</sup> Where, however, the door of the railway carriage is closed by the servants of the company as a person is entering the carriage, and his fingers are crushed, this is negligence sufficient to enable the injured person to recover damages against the company.<sup>2</sup>

Another case arising out of overcrowding, showing that unless the overcrowding in fact conduces to the damage complained of, no cause of action arises, is *Cobb v. G. W. Ry.* (1894), A.C. 419. Part of the complaint was, that the defendant railway company had been negligent in allowing the carriage, in which the plaintiff was, to be overcrowded, and had so facilitated his being hustled and robbed. The facts alleged in the statement of claim were, that the plaintiff, while a passenger in a train of the defendants', which was then stopping at a station, was robbed by a gang of men who entered his carriage. He immediately made a complaint to the station-master, who refused to detain the train to permit the plaintiff to give the men into custody, and have them searched; whereby the plaintiff was prevented from recovering his property, which he would have recovered, if time had been afforded for a search. There was also the allegation of negligence as to overcrowding already mentioned. It was held in the House of Lords, affirming the Court of Appeal and a Divisional Court, that no cause of

*Cobb's case*: train need not be delayed so that passenger may have time to give men into custody who have robbed him.

entering a carriage and after taking his seat, see *Taylor's case* (ante, p. 140); *Fordham's case* (ante, p. 140); *Richardson's case* (ante, p. 141).

<sup>1</sup> *Drury v. N.E. Ry.* (1901), 2 K.B. 322.

<sup>2</sup> *Taylor v. M. & S.L. Ry.* (1895), 1 Q.B. 134 (ante, p. 140).

Over-crowding shown not to have been the cause of plaintiff's loss.

action was disclosed, no breach of duty by the company being shown. No direct connection between the over-crowding, and the loss the plaintiff sustained, was established by the allegations in the statement of claim. It was not sufficient to suggest that the effect of the overcrowding was to facilitate the hustling and robbing of the plaintiff.

As to the refusal to delay the train, it was held that starting the train in the ordinary course, was not opposing an obstacle to the recovery of the plaintiff's property, of such a kind as to make the company responsible, in the same way as if their negligence had caused or contributed to the robbery. If there was a duty to give opportunity for the arrest of the thieves, that was not a duty owed by the company to the plaintiff as their passenger; but a duty to public justice, the failure in which by one of the servants of the company cannot make the company liable. In the course of the arguments the Lord Chancellor (Lord Selborne) doubted the correctness of the decision in *Pounder v. N.E. Ry.* (1892), 1 Q.B. 385. There, the servants of a railway company had distinct notice, that the plaintiff had reasonable grounds to fear that an assault would be committed on him by certain other passengers in his carriage, if he were compelled to travel in the same carriage with them without protection. He was, nevertheless, compelled to do so unprotected, and the apprehended assault was committed. Upon bringing an action against the company, it was held by a Divisional Court, that the neglect of a railway company to supply reasonable accommodation, does not enable a passenger to recover damages for an assault committed on him by other passengers. This was also a case of overcrowding, and the ground of the decision was, that there is no duty to take extraordinary care of a passenger because of any peculiarity attaching to him; and that the consequences of putting the plaintiff in the carriage with the persons who assaulted him would not, at the time of the contract, be that he should be assaulted.

*Pounder's case*: whether company bound to take special precautions to prevent passenger being assaulted.

The plaintiff had made himself obnoxious to pitmen in the neighbourhood. This was unknown to the company when he took his ticket. It became known to them, however, almost immediately afterwards, and he sought refuge in the guard's van. From there he was ejected, and forced by the company to go into a carriage with the pitmen. They greatly overcrowded the carriage, and assaulted him before he arrived at the first station. They then got out, and other pitmen got in, and again assaulted him; and this was repeated at each station at which the train stopped. The Lord Chancellor said that in his view, if it were necessary to reconsider that decision, he would not be able to support it. The other learned lords preferred to reserve their opinion on this case; but if it be sound law, it might lead to some rather alarming results. It may be that the case should rightly proceed on the duties of the company independently of contract, and, therefore, that the fact that at the time the contract was entered into the defendants did not know of any necessity for giving special protection to the plaintiff, is not a dominating factor in the consideration of the circumstances. But even in respect of the duties of the company under the contract, it might be said that, *quà* passenger, the plaintiff was not the obnoxious person; the obnoxious persons were those who threatened to assault and did assault him, and who made that threat, so that it was brought to the knowledge of the company's servants that they intended to assault their passenger.

These circumstances do not involve the consideration of a case where something extraordinary happens to a passenger under circumstances unknown to the company. Their duty is to carry him safely, and the cases show, that that duty is not confined to the actual transit, but applies also to matters incidental to the carrying. Whether the duty of carrying him safely can be said to have been discharged, when the company's servants allowed persons to get into his carriage whom they knew were going to commit an



assault upon him, may be doubted. The Master of the Rolls in *Cobb's case* (*ante*, p. 307), distinguished that case from one where it could be alleged "that the plaintiff was being ill-used or assaulted in the train, and that, the fact being known to the defendants' servants, they did not interfere to prevent it;" a distinction approved of by the Lord Chancellor, who thought that the facts of *Pounder's case* were within this distinction.

*Redhead's case.*

We have already seen, in noticing *Redhead v. Midland Ry.*, L.R. 4 Q.B. 379 (and see p. 277), that railway companies are not insurers of passengers, and are not, therefore, liable for accidents which no skill or foresight could have avoided. The contract made by a general carrier of passengers for hire, it was established in that case, does not amount to a warranty by way of insurance by the carrier, to carry the passenger safely, or a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, free from latent defects which no skill could have detected. The obligation undertaken by the carrier is to take due care (including in that term the use of skill and foresight) to carry the passenger safely.<sup>1</sup> In *Redhead's case* the accident was due to the breaking of a tyre of one of the wheels of a carriage, and the breakage arose from a latent defect, which was not to be attributed to any fault on the part of the manufacturer of the tyre, and which could not have been previously detected. If the defect, by the exercise of care and skill, could or ought to have been discovered, and was not, this would amount to negligence. In this respect, the contract differs from that made for the conveyance of goods, where the common carrier is an insurer, or, in the words of Holt, C.J., in *Coggs v. Bernard*, "he is bound to answer for the goods at all events." Montague Smith, J., in delivering the judgment of the Court, while saying that it was impossible to define all the liabilities which the obligation to take due care imposes

<sup>1</sup> See also *E. Ind. Ry. v. Kalidas* (1901), A.C. 396.

on the carriers of passengers, adds: "Due care, however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on the carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed, or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected."

This exception as to latent defects does not, however, apply to the sale of a chattel for a specific purpose, as we saw in *Randall v. Newson*.<sup>1</sup> The same principle was applied in deciding *Daniel v. Metropolitan Ry.*, L.R. 5 H.L. 45. *Daniel v. Metropolitan Ry.* The plaintiff was a passenger, and a girder fell upon his carriage and injured him in the course of his journey. It appeared, that the City of London Corporation were authorized by statute to execute certain works over the line of the defendant company. The work partly consisted in placing heavy iron girders upon walls running along the line of railway, and were works, therefore, which involved danger, but which were often carried out without mischief. The defendant company had no control over these works, which were executed by contractors engaged by the Corporation. During the work a girder, which was being moved by a monkey steam-engine—a new method never before made use of, and quite unanticipated by the defendant company—overbalanced, and fell upon the carriage in which the plaintiff was travelling. The defendants were held not to be liable. As the works were entrusted to contractors independent of the defendant company, and the defendants had nothing to do with the

<sup>1</sup> *Ante*, p. 81.

execution of the works, it was held not to be the duty of the defendant company to assume that the works would be negligently conducted by the contractors, and to take precautions against possible negligence on the part of those over whom they exercised no control, and who were not in the defendant company's employment.<sup>1</sup> If, however, the works, which were being carried on, had been such as according to previous experience involved danger, however carefully performed, Lord Colonsay was of opinion that it would then have been incumbent on the railway company to foresee, and take precautions against, the danger.

A case of  
"a foreign  
truck."

There is a case, decided on very special facts, which relates to the duty of railway companies, as regards "foreign trucks" coming on to their line. In *Richardson v. G.E. Ry.* (decided in the Court of Appeal), 1 C.P.D. 342, the defendants had a junction at Peterborough and, being bound by law to do so, received from other lines a great number of trucks to be forwarded through. Their practice was, when a "foreign truck" came on to their line, to give it a general examination, without undue delay; tapping the tyres of the wheels, and generally looking out for defects. Once, when doing this, they discovered a defect in a truck, and sent it back to the waggon company to whom it belonged, to be repaired. The owners accordingly repaired that defect, and returned the waggon to the defendants, who then sent it on to its destination. During the journey an accident happened, injuring the plaintiff, owing to the existence of a crack in one of the axles of the truck, which was not the defect that had previously been discovered and remedied. A minute examination of the truck would have led to the detection of this defect in the axle. The jury found this was so, but that the defendants were not bound to make that minute examination. They also found, that as the truck had previously been found defective (in other respects), it was their duty to require from the owners of the truck

<sup>1</sup> See also *Kiddle v. Lovett*, 16 Q.B.D. 605 (*ante*, pp. 33, 34).

some distinct assurance that it had been thoroughly repaired. On these findings, it was held that the verdict must be for the defendants. They were not bound to do more than they had done as regards examining the truck, and were not bound to make any such inquiry as that suggested by the jury. They had not failed to discharge any duty which was upon them, and, therefore, were not guilty of any negligence.

It is the duty of a railway company to take reasonable care to keep their premises in such a state as that those whom they invite to come there, shall not be unduly exposed to danger; but they are not bound to do anything more than that.<sup>1</sup>

The duty of a railway company to keep their premises reasonably safe.

Moreover, if an accident occurs at a joint station by the negligence of the defendants' servants, though the plaintiff is not a passenger of theirs, nor on the premises on any business concerning them, they are liable, just as they would have been if the accident had occurred in the public streets.<sup>2</sup>

A sheet of ice had been allowed to remain on a platform at the defendants' railway station, and the plaintiff, a passenger, slipped on it, and injured himself. No explanation was given by the defendants of how the ice got there. The defendants were bound to keep their station reasonably safe for passengers, and they were held guilty of negligence in allowing the ice to remain on the platform, and the plaintiff recovered damages.<sup>3</sup>

On this point, the cases already noticed should be referred to—*Osborne v. L. & N.W. Ry.* (*ante*, p. 210), where a passenger recovered damages for injuries sustained by falling upon slippery steps; *Welfare v. L.B. & S.C. Ry.*, L.R. 4 Q.B. 693 (*ante*, p. 110), where a person lawfully on a station, could not maintain an action when he was hurt by

<sup>1</sup> *Welfare v. Brighton Ry.*, L.R. 4 Q.B. 693 (*ante*, p. 110); *Smith v. G.E. Ry.*, L.R. 2 C.P. 4 (*ante*, p. 119).

<sup>2</sup> *Tebbutt v. Bristol & Exeter Ry.*, L.R. 6 Q.B. 73.

<sup>3</sup> *Shepherd v. Midland Ry.*, 25 L.T., N.S. 879.

a workman falling through the roof; and *Smith v. G.E. Ry.*, L.R. 2 C.P. 4 (*ante*, p. 119), where a woman bitten by a dog at a station, could not recover damages, because there was no negligence on the part of the defendants' servants.

Passen-  
gers  
travelling  
"at own  
risk."

It sometimes occurs that passengers elect to be carried by a railway company by a free pass, under conditions that they should travel at their own risk. Under those circumstances, the company are not liable in respect of an accident happening in the course of the journey. *McCawley v. The Furness Ry. Co.*, L.R. 8 Q.B. 57, was one of those cases, which was decided on demurrer to the declaration. The plaintiff having sued for negligence whereby he had been injured by the defendants, the plea alleged that he was received as a passenger under a free pass, as a drover accompanying cattle, one of the terms of which was, that he should travel at his own risk. The replication was, that the accident happened by the defendants' "gross and wilful negligence." The replication was held to be bad; the plaintiff had agreed that the defendants should not be liable for the consequences of any accident happening to him during the journey; and whatever "gross and wilful negligence" might mean, the defendants were not liable.

Travelling under these conditions "at own risk," exempts the company from liability, not only during the actual transit, but also while the plaintiff is going off the defendants' premises. In *Gallin v. L. & N.W. Ry.*, L.R. 10 Q.B. 212, the plaintiff, also a drover of cattle, and travelling under the same conditions, was injured one night when walking from a bridge, where the train stopped, in order to go off the defendants' premises, the parapet of the bridge being low and dangerous; and it was held that the defendants were not liable. Where the ticket, taken under such conditions, entitles the plaintiff to travel through to his destination over the lines of another company than that from which he obtained his ticket, the exemption extends

to protect the other company as well.<sup>1</sup> Where, however, Goods, goods are conveyed under a contract by which it is agreed <sup>etc., sent</sup> "at the owner's risk, the owner's risk." conditions must be reasonable.<sup>2</sup> The Courts, in determining whether conditions are reasonable or not, take into consideration the fact, whether the customer has any reasonable alternative mode of conveying the things placed before him by the company.<sup>3</sup> A contract which was held to be unreasonable, as exempting the company from loss, however occasioned, the owner undertaking all risks, was not effective to protect the company from liability for injury caused to cattle by their negligence in delivering them; notwithstanding that the company also, as part of their contract, granted a free pass to the owner's servant in order that he might take charge of the cattle.<sup>4</sup>

Where, however, the contract being to carry cheeses "at the owner's risk," and the condition was held to be reasonable, inasmuch as a reasonable alternative was offered to the owner to send his goods at a higher rate, by which the company undertook the ordinary liability of carriers; the company were held to be exempt from liability. There was a term in the contract by which the company's liability for injury arising from the "wilful misconduct" of their servants was retained. Their servants packed the cheeses in such a way that they were damaged during the transit, but they were not aware that their mode of packing them would cause damage; and this was held not to be "wilful misconduct" on their part; and the defendants, therefore, were not liable for the damage under the terms of their contract.<sup>5</sup> The term "owner's risk" was in this case

<sup>1</sup> *Hall v. N.E. Ry.*, L.R. 10 Q.B. 437.

<sup>2</sup> See the cases on reasonable conditions referred to in the note, *ante*, p. 264.

<sup>3</sup> *Brown v. M. & S.L. Ry.*, 8 App. Cas. 703.

<sup>4</sup> *Rooth v. N.E. Ry.*, L.R. 2 Ex. 173.

<sup>5</sup> *Lewis v. G.W. Ry.*, 3 Q.B.D. 195 (*ante*, p. 264). See also *Brown's case* (*supra*), and *McCarthy's case*, 12 App. Cas. 218.

construed with regard to the course of business between the plaintiff and the defendants known to both of them, as afterwards mentioned.

Railway companies' responsibility as bailees is not affected by their giving notice to the consignee that the goods remain at the owner's risk.

A railway company cannot, however, rid themselves of their liability as bailees of the goods after arrival, by sending a notice to the consignee that the goods are held "at the owner's sole risk;" the goods having been carried at the company's ordinary risk as carriers. Upon the goods arriving at their destination, and the carriers giving notice of their arrival to the consignee, their liability as carriers ceases, and that of warehousemen or bailees arises.<sup>1</sup> The notice the company sent to the consignee in one case, advising them of the arrival of the goods, contained the intimation already mentioned. The consignee delayed taking the goods away for more than two months, and they were damaged by wet, owing to the fact that the defendants had not taken such reasonable care of them as a bailee is bound to take. It was held, that even treating the advice-note, which had been acquiesced in by the plaintiff, as a contract, it did not exempt the defendants from their liability as warehousemen, or bailees, and that they were liable for the damage done.<sup>2</sup>

Liability for delay in carrying goods conveyed "at owner's risk."

Where there was a contract, being a reasonable one, exempting the company "from all liability for loss or damage by delay in transit or from whatever other cause arising," it was held in *Brown's case* (*ante*, p. 315) that this expressly covered loss arising from delay.<sup>3</sup> But where the stipulation is that goods are to be carried "at owner's risk," this does not cover damage by reason of delay.<sup>4</sup>

The carriage of goods "at

Nor will "owner's risk" always free the carrying company from the consequences of their own negligence in other

<sup>1</sup> *Ante*, p. 279.

<sup>2</sup> *Mitchell v. L. & Y. Ry.*, L.R. 10 Q.B. 256 (*ante*, p. 279).

<sup>3</sup> And see *Moore v. Harris*, 1 App. Cas. 318.

<sup>4</sup> *Robinson v. G.W. Ry.*, 35 L.J.C.P. 123; *D'Arc v. L. & N.W. Ry.*, L.R. 9 C.P. 325.

respects. It was held to have that effect in *Lewis's case* (ante, p. 315), because it was the course of business between the plaintiff and the defendants, well understood by both of them, that goods carried at the lower rate were to exempt the defendants from all liability in respect of them, except damage arising from the wilful neglect of the defendants' servants. But in *Martin v. Great Indian Peninsular Ry.*, L.R. 3 Ex. 9 (ante, p. 70), there was a stipulation in the contract that the defendants accepted no responsibility, and it was held that this stipulation did not exempt them from liability arising wholly from their own negligence.<sup>1</sup>

owner's risk" does not always exempt the defendants from loss due to their own negligence.

Railway companies, who are empowered by statute to use locomotive engines, are not liable in damages for a fire caused by one of their engines, unless it is proved that the company were negligent; the onus of proving this being on the plaintiff.<sup>2</sup> If they have not such statutory authority, they are liable at common-law for the damage, though they have not been guilty of negligence, on the general rule of common-law as stated in *Fletcher v. Rylands*, L.R. 3 H.L. 330 (ante, p. 47).<sup>3</sup> In the same way, where the defendant in using a steam traction engine set fire to the plaintiff's stack of hay, without any negligence, he was held liable, upon the ground that the engine being a dangerous machine, an action was maintainable at common-law, and the Locomotive Acts did not restrict his liability.<sup>4</sup>

Adjacent property set on fire by sparks from an engine.

An instance of the negligence of a railway company, *Smith's case*, by which their liability for setting fire to the plaintiff's property was established, occurs in *Smith v. L. & S.W. Ry.*, L.R. 6 C.P. 14. The defendants were a railway company, and their servants, after cutting the grass and trimming

<sup>1</sup> And see *Gill v. M. & S.L. Ry.*, L.R. 8 Q.B. 186 (ante, p. 257); and *Mallett v. G.E. Ry.* (1899), 1 Q.B. 309.

<sup>2</sup> *Vaughan v. Taff Vale Ry.*, 29 L.J. Ex. 247 (ante, p. 15); *Port Glasgow Co. v. Caledonian Ry.*, 18 Ct. Sess. Cas. 4th Series (Rettie), 608; 1893, W.N. 29.

<sup>3</sup> *Jones v. Festiniog Ry.*, L.R. 3 Q.B. 733.

<sup>4</sup> *Powell v. Fall*, 5 Q.B.D. 597.



the hedges bordering on the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there for fourteen days in very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps. The fire was carried along to a stubble-field, and thence over a road to the plaintiff's cottage, which was burnt. The evidence attributing the original fire to a spark from one of the company's engines, was held to justify the jury's finding that the fire was so caused. It was also found, that the defendants were negligent in leaving the trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field; and it was held that their negligence had made them responsible for the resulting injury to the plaintiff.

*The Port  
Glasgow  
Co.'s case.*

In the case of the *Port Glasgow Co. v. Caledonian Ry.*, 19 Ct. Sess. Cas. 4th Series (Rettie), 608, affirmed in the House of Lords, 1893, W.N. 29 (*supra*), the defendant railway company had statutory powers to run their trains, and they were guilty of no negligence. A flax store belonging to the plaintiff near to the defendants' line was set on fire by a spark from one of the defendants' engines. The suggestion of negligence made, and the question what would constitute negligence as regards the construction of the engines used, was carefully considered. The negligence alleged was, that the engine was improperly constructed, because it had no "spark arrester"—a species of cage to catch sparks. The defendants showed that these contrivances were obsolete; that they were never used on modern engines such as this was; that to use one on such an engine would be to impair its efficiency; but that other means had been adopted in the construction of the engine to prevent the emission of sparks. Their evidence was that these means were as efficacious as the use of "spark arresters" would be. On the other hand, witnesses for the

plaintiff deposed that in their opinion "spark arresters" ought to be used. They admitted that they had never seen them used on engines of the type of this one; but did not admit that their use on such an engine would impair its efficiency. It was held, that it had not been proved that the defendants were negligent because a "spark arrester" had not been fitted to their engine; and this decision was upheld in the House of Lords. The ground upon which such actions go is, that the Legislature, by authorizing the use of steam power, without limiting the power or the speed of the engine, has impliedly indemnified railway companies against the consequences of using their engines; provided that the engines are of the best construction, and that proper safeguards are used for minimizing the risk of damage by fire. But it was said by Lord McLaren (and acquiesced in by the other members of the Court) that railway companies are not prevented by the law from improving the efficiency of their engines, merely because the improvement may entail in some small degree a greater risk of setting fire to adjacent property; though they would not be justified in law in foregoing all safeguards against fire. The question, therefore, is one of degree.<sup>1</sup>

*Simkin v. L. & N.W. Ry.*, 21 Q.B.D. 453, is another case which becomes somewhat similar to this by reason of the decision arrived at; but in that case the real cause of the accident was, by the decision, withdrawn from the jury. The plaintiffs there were leaving the defendants' station in a carriage at Bletchly, where they had arrived by the defendants' railway. The horse was frightened by the

<sup>1</sup> *Note*.—The question relating to damage caused (without negligence) by vibration owing to the passing of trains, is one which involves the consideration of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, and does not come within the scope of this work. The leading case on the subject, which has been much discussed in subsequent cases, is the *Hammersmith Ry. v. Brand*, L.R. 4 H.L. 171. The reader is referred on this point to Mr. Hodge's work on Railways.

sight and sound of the engine blowing off steam, and the carriage was upset and the plaintiffs injured. The engine was not defective or improperly used; but the alleged negligence consisted in not screening the railway from the roadway leading to the station, and that this was the cause of the accident. It was held in the Court of Appeal (Fry, L.J., doubting) that the defendants had not omitted to conduct their railway with reasonable care and caution. There was no statutory obligation upon them to erect a screen, and no duty otherwise, it was said, to do so. They were carrying on a business authorized by the Legislature, and not doing so with any neglect of duty, they were not liable. "We cannot think," said Lopes, J., delivering the judgment of himself and Cotton, L.J., "that in this case there is any evidence that ought to have been left to a jury of negligence by the defendants in not sufficiently and properly screening their railway from the road." There could be no doubt that the accident was caused by their not doing so, but it was held that there was no duty upon them to erect a screen. The judgment of Fry, L.J., which is referred to *ante*, p. 7, in which he felt bound, against his own view, to acquiesce in the judgment pronounced by the majority of the Court, should be noticed.

## CHAPTER XXIV.

### *Level crossings.*

WHERE the Legislature authorizes railway companies to construct a railway and to work it, they are bound to work it in a reasonably proper manner, having regard to the safety of the public; as we have already seen with regard to sparks from an engine. Where the authorization includes the working of a line across a footpath or road on a level, the company may, under certain circumstances, have duties to discharge as regards taking precautions for the safety of persons passing along such level crossings, greater than those imposed by the Legislature.<sup>1</sup> There is no general duty on railway companies to place watchmen at public roads crossing a railway line on a level; but it depends on the circumstances of each case whether their omission to do so amounts to negligence. The statutory duties as regards a carriage-way and a footpath, are different. By sec. 47 of the Railway Clauses Consolidation Act, 1845, which applies to carriage-ways, the company are bound to have some one to close the gates when a train is expected. But sec. 61, which applies to footpaths, merely imposes the duty of erecting proper swing gates.

Level crossings.

Railway Clauses Consolidation Act, 1845, secs. 47 and 61.

A railway was so constructed as to make a sharp curve at the place where the train passed over a level crossing, at which there were locked gates for carriages, and also swing gates for foot-passengers. There was also a bridge at the crossing which prevented persons from seeing a train coming. It was held that, having regard to the great risk

*Bilbee's case.*

<sup>1</sup> And see *ante*, p. 101.

thus arising at this place, though there was no statutory duty to do so in regard to passengers over the footpath, a man should have been placed at the gate, or some extra precautions should have been adopted, for the safety of persons lawfully passing along the public footway.<sup>1</sup> In that case, persons passing over the footpath were exposed to greater peril than is ordinarily incident to a level crossing, and were prevented, by the obstructions to the view of approaching trains, from taking care of themselves. This state of circumstances imposed on the company an obligation to take something more than the usual precautions for the safety of persons going over the crossing.

*Stubley's  
case and  
Cliff's  
case.*

But where at a level crossing, which was protected by gates on each side of the line, and by which caution boards were placed, the view of the line was obstructed by the pier of a railway bridge, but on the level of the line there was an unobstructed view for three hundred yards each way; a woman killed in crossing the footway was held not to have been negligently injured because there was no watchman provided at the gates.<sup>2</sup> So, too, in another case,<sup>3</sup> where there were gates across the footway left unfastened, and the railway company had at one time placed a watchman there, but had, for some time before the plaintiff was injured, ceased to do so, and there was nothing extraordinarily dangerous, it was held to be no negligence that the railway company had not provided a man to open and shut the gates. It was shown in this case that a fatal accident had previously occurred at this spot, and that the company had received many complaints in regard to it; and also that they had obtained powers to make a new road, and close the crossing; but they were not bound to exercise those powers for a period which had not elapsed when the accident happened. Certainly, according to the facts

<sup>1</sup> *Bilbee v. L.B. & S.C. Ry.*, 34 L.J.C.P. 182

<sup>2</sup> *Stubley v. L. & N.W. Ry.*, L.R. 1 Ex. 13.

<sup>3</sup> *Cliff v. Midland Ry.*, L.R. 5 Q.B. 258.

proved, experience would seem to have shown that this crossing was a more than ordinarily dangerous one, and that special precautions were called for by the company.

A different set of circumstances was presented by the case of *Stapley v L.B. & S.C. Ry.*, L.R. 1 Ex. 21 [affirmed in *Wanless v. N.E. Ry.*, L.R. 6 Q.B. 481; 7 H.L. 12 (*ante*, p. 91)]. There were gates at the crossing for carriage traffic, and a turnstile for foot-passengers. By the Railway Clauses Consolidation Act, 1845 (sec. 47), the company were bound, as regards the carriage-way, to erect proper gates at the crossing, and to keep them closed across the road on both sides of the line, except when cattle and carriages had to pass across. The gates, too, had to be so constructed as, when closed, to fence the railway; and the person who had care of the gates was bound to close them as soon as the cattle, etc., had passed through them. *Stapley* was a foot-passenger, and while going over the crossing he was knocked down and killed by a passing train belonging to the defendants. At the time of the accident, contrary to the provisions of the statute, and to the rules of the company for the safety of carriage, etc., traffic, the gates on one side of the line were partially open, and there was no gate-keeper present to take charge of the gates. It was held that these circumstances afforded evidence of negligence. The fact that the precautions for the safety of carriage traffic had been neglected, might be taken to amount to an intimation by the defendants that the line might be safely crossed by foot-passengers. In *Wanless's case* (*supra*) it was also held that the fact of gates being left open, which the company were bound by statute to keep closed when trains were approaching, is in itself evidence of negligence, being an intimation to any one crossing that the line was safe.<sup>1</sup>

*Skelton's case*, L.R. 2 C.P. 631 (*ante*, p. 102), which was decided in 1867, also shows that where several railway

*Stapley's case*: an instance of conduct by the company which misled the plaintiff to think the line was safe.

*Skelton's case* considered.

<sup>1</sup> And see *Bridges' case*, L.R. 7 H.L. 213 (*ante*, p. 296).

lines crossed a public footpath on the level, the place, however, not being unusually dangerous, the company have fully performed their duty by carrying out the statutory requirements to erect swing gates; and they are not obliged to do more, either in keeping the gates closed when a train is approaching, or in having a man at the gates. This was not a carriage-way, but a footpath only, and sec. 47 of the Act did not apply; the section as to footpaths (sec. 61) not requiring the company to do more than to erect gates. The man who was killed in crossing was, in this case—and it is almost always a subject of consideration in these cases—held to have been guilty of contributory negligence. A coal-train was standing at the gates when he wished to cross. He waited for it to pass, and then, finding the gates unfastened, he commenced to cross the line, without looking up or down. But there was a circumstance in this case which must have operated upon the question whether the deceased had been guilty of contributory negligence, if effect had been given to it. By way of extra precaution, the company generally, but not invariably, fastened the gates when a train was approaching. On this occasion the gates were unfastened, and the jury found that, by usually fastening the gates, and not doing so on this occasion, a snare had been prepared, which caused the accident. In other words, that leaving the gates open amounted, under the circumstances, to an intimation that the line might be safely crossed. The jury were, in effect, not allowed to consider this question. The plaintiff was non-suited, and the non-suit upheld, on the ground that there was no evidence to go to the jury of negligence by the defendants. The extra precaution of generally closing the gate was, it was said, not to be used against them. It was a purely voluntary act on their part. They would have been liable, said Willes, J., if the voluntary act had been improperly performed, but were not liable merely because they had neglected to perform it. Whether that proposition was rightly

applied to the facts of this case, would seem to be placed in doubt by the decisions on the cases dealing with the question of what conduct amounts to an intimation of safety in crossing. This, it would seem, is a question of fact for the jury to consider with reference to all the circumstances, as in *Stapley's case* (*supra*). Though there was no unusual danger at this crossing which would have made it the duty of the company to take extra precautions beyond those imposed by statute for the safety of the public, and though in such case, and the view of the line being unobstructed, a passenger crosses at his own risk;<sup>1</sup> yet the circumstance that the company had omitted to take the voluntary precautions they were generally in the habit of taking at this crossing, would seem at least to raise a question for the jury, whether the deceased had thus been misled, by the conduct of the company, into the belief that he might safely cross the line. In *Cliff v. Midland Ry.* (*ante*, p. 322) the company had, for some time before the accident occurred, ceased to have a man at the gate, which they were not bound by the statute to do; but in *Skelton's case*, the course of conduct they had adopted of closing the gates when a train was approaching, was being exercised up to the time of the accident. To lay down that a company's conduct in omitting to perform an habitual act of caution, though a voluntary one, must, as a matter of law, be held to afford no evidence of their negligence, would appear to lose consideration of the question whether their action had not amounted to a declaration by them that this extra precaution was necessary; and the further question of fact whether, by omitting to take the course they had themselves made a usual one, they had not induced a reasonable belief that the line might be safely crossed, so as to put a person crossing it off his guard.

*Lunt v. L. & N.W. Ry.*, L.R. 1 Q.B. 277, involved the *Lunt's case*: a private question of the company's duty in respect of a private way

<sup>1</sup> *Ellis v. G.W. Ry.*, L.R. 9 C.P. 551 (*post*, p. 328).



way  
blended  
with a  
public  
one.

peculiarly situated as regards the public carriage-way. The line was made across a public road diagonally on a level, and the access to one Crossfield's storeyard was cut off. There was a private way to the yard nearly straight across the railway, the private way and the public road blending somewhere upon the line of rails. There was a gate, on Crossfield's side of the railway, opening into his yard, which was a private gate under his control. Nearly opposite, on the other side of the railway, there was one gate across both the private way and the public carriage-way, and this gate was under the defendants' control, who kept a gate-keeper there in accordance with the provisions of sec. 47 of the Act of 1845. Any one going to and from Crossfield's yard with a carriage, passed through this gate across the railway, and through the private gate opposite. The plaintiff's carman, with his cart and horses, was, one evening after dark, about to leave Crossfield's yard, and having opened the private gate, the opposite gate being nearly closed, called to the defendants' gate-keeper to ask whether the line was clear. The gate-keeper answered, "Yes, come on." The cart and horses accordingly proceeded, and were ran into by a train.

Private  
roads.

Duties on  
a railway  
company  
beyond  
those  
imposed  
by sec. 47.

The duty imposed by statute on a railway company as regards private roads is enforced by sec. 68 of the Act of 1845, which merely requires the company to make proper fences and gates; the gates on each side of the railway being in the control of the private owner, who has to keep them locked. Having regard to the position of these gates, and the access to, and exit from, Crossfield's yard, it became necessary to consider the effect of sec. 47 of the Act, in order to determine whether the company, by their servant, had been guilty of any neglect of duty. It was held, that that section implied the duty of using proper caution in opening the gates. Whatever might have been the consequence, had the way used by the carman been simply a private way, as he could not get

across the railway on to the public road without passing through the public gate, it was the gate-keeper's duty to open or refuse to open it for him; and what the gate-keeper did was equivalent to opening the gate, and he was therefore guilty of negligence, for which the defendants were liable. "I think," said Blackburn, J., "the construction of the section (47) can only be that the 'proper persons' are to exercise reasonable caution and look to the line and see that it is clear, and open the gates when they see it is clear, and not otherwise."

In the subsequent case of *Wanless* (*ante*, p. 323), where the view was expressed in the House of Lords that when the gates of a public carriage road are left open, it amounts to a statement by the company, and a notice to the public, that the line at this time is safe for crossing; it was held that under sec. 47 it is the duty of the company to keep the gates closed when a train is approaching. If this is not done, and a passenger crossing the highway is injured, the leaving the gates open is evidence of negligence to go to the jury. And this is so, even though, with care and caution, the person crossing might have been able to see, at a distance, the approach of the train; because, as it was put, he might very well have been influenced by the circumstances that the gates were open. "It is quite clear he might have seen the other train—there is no doubt about that," said the Lord Chancellor (Lord Cairns)—"but the result of the state of facts only comes to this, that being brought upon the line through the circumstance of the gate being open, he was placed in a position which was more or less embarrassing, and he did not use his faculties so clearly as he might have done under the circumstances."

It is also implied, as was laid down in *Cliff's case* Footpaths. (*ante*, p. 322), when a railway company is empowered by statute to construct and work a railway, that they are to work it in a reasonably proper manner; and in crossing a footway on a level, they are bound to

*Ellis's*  
case con-  
sidered.

take all ordinary precautions necessary to secure the safety of persons passing over the level crossing.<sup>1</sup> The case of *Ellis v. G.W. Ry.*, L.R. 9 C.P. 551 (*ante*, p. 325), was one where a difference of opinion arose in the Exchequer Chamber on the question, which so often provokes a difference of judicial opinion, whether there was evidence of negligence to go to the jury. The accident happened at a level crossing on a dark December night. At the crossing there were gates for carriage traffic, and a hand-gate for foot-passengers. The carriage traffic gates were proved to have been closed at the time of the accident; but the evidence was that there were no lights at the gates, and that the plaintiff could not see whether they were closed or not. His evidence, and that of the defendants, showed that the train which knocked him down, did not whistle so as to give notice of its approach. His evidence also was, that he saw no lights on the train. The defendants' witnesses said there were side-lights on the train, and a light on the engine. He said, that he heard no caution or warning given by the porter in charge of the gates; while the porter said, he had called to the plaintiff not to cross. The judge at the trial (Grove, J.) ruled that there was evidence of negligence by the defendants to go to the jury; and he was supported in this view by Cockburn, C.J., and Cleasby, B., who formed the minority in the Exchequer Chamber; the remaining four judges holding that there was no evidence of negligence by the defendants to go to the jury. It is to be noted that this case was decided before the decision in *Slattery's case* (*ante*, p. 137) by the House of Lords, in which it was held, that when there is conflicting evidence on a question of fact, whatever the opinion of the judge may be of the value of that evidence, he must leave it to the jury. But it is interesting to see how these facts presented themselves to the minds of the judges in the Exchequer Chamber.

<sup>1</sup> *Per Mellor, J., Cliff's case* (*ante*, p. 322), at p. 261.

Cockburn, C.J., said: "There was no light at or near the level crossing by which the plaintiff could see whether the gates, usually closed to prevent carriages from passing when a train was approaching, were open or shut, so as to form a judgment whether a train was likely to pass or not. According to his account, he saw no light as of an approaching train, and heard no whistle from the train to intimate to any person crossing the line that a train was approaching. Assuming that the train by which the plaintiff was knocked down had not the usual lights, and that no indication of danger was given by sounding the whistle when the train was coming to where a level crossing was, I am of opinion that it was a question for the jury whether the absence of lights and the omission to sound a whistle did not amount to neglect on the part of the company to take reasonable precautions to prevent accident to a person crossing the railway." He thought that *prima facie* the plaintiff had adduced some evidence of negligence to go to the jury. Mellor, J., said that it was not enough to make out a case, that the plaintiff did not see a light or hear a whistle; he must give some evidence that there was something negligent and unusual in the working of the train that night, and he did not think there was. It is rather difficult to follow this, for Bramwell, B., said it was shown by the defendants' evidence that there was no whistle; which would, one would think, be evidence of something negligent. But Bramwell, B., delivered one of his characteristic judgments. "It is not shown," he said, "that warning was not given. The witness who says he gave warning may be displaced if the contradiction is believed." It is submitted, that it was for the jury to say which witness they believed; but Bramwell, B., disposes of the point whether there was evidence that no warning was given, in an amusingly ingenious fashion. He continues: "But that only proves that there is no evidence that warning was given, not that

The view  
of Cock-  
burn, C.J.

Mellor, J.'s  
view.

Bramwell,  
B.'s, view.

there is evidence that it was not." If there was no evidence that warning was given, the plaintiff would appear to have made out a *prima facie* case that the defendants had not been acting with reasonable care for the safety of persons crossing the line. "The only thing relied on for that purpose," he goes on to explain, "is the statement of the plaintiff that he did not hear it. That is no evidence that it was not done. It is consistent with two things—one, that it was not given; the other, that, though given, it was not heard. And when testimony is equally consistent with two things, it proves neither. This may seem a subtlety, but it is not." It does not, however, even seem a subtlety to say, that if a warning is given which cannot be heard, it is no warning at all. But Bramwell, B.'s, point of view is really contained in the first part of his judgment. "The road being straight," he said, "things on it visible for a quarter of a mile in one, and half a mile in the other direction, nothing to impede the view or make a difficulty for the foot-passengers crossing the line, nothing was necessary to be done by the defendants." Upon that statement it might well be that the defendants had done all that they were required to do. But that statement flies in the face of the admitted facts of the case. So far from the road being visible up and down the line, the night was a dark one in December, and not only could the plaintiff not see up or down the line, but he could not even see whether the unlighted carriage gates, which were close to him, were shut or open. If there had been lights to the train, probably he ought to have seen the approaching train, if he had been himself reasonably careful; but whether there were lights on the train was a disputed fact for the jury to determine. It is, however, tolerably plain that this case is not now one of authority, after the decisions of the House of Lords in *Wanless's case* (*ante*, p. 323) and *Slattery's case* (*ante*, p. 137); but it remains an instance of

the strong line taken by judges, who were animated by the idea that it was dangerous to leave these cases in the hands of a jury.

The case of *Smith v. S.E. Ry.* (1896), 1 Q.B. 178, is also one where a person passing over a level crossing might have been misled by the conduct of the company's servant; and the Court of Appeal held, consequently, that there was evidence to go to the jury of negligence on the defendants' part. The facts are somewhat peculiar; but the whole decision appears to have turned upon the fact that, as the man who was killed in crossing knew that the gate-keeper was in the habit of signalling an approaching train, and on this occasion did not do so, he might reasonably have regarded this omission as an intimation to him that he might safely cross the line. The defendants' line crossed a public highway on the level. There were gates for the carriage traffic, and a smaller one for foot-passengers. There was a gate-keeper's lodge near the crossing, where a servant of the defendants' was stationed. Under the company's regulations, this man's duty was to attend to the carriage gates at the crossing, and whenever a train was approaching, to stand by the rails, and if the line was clear, to exhibit a white flag or a white light. There were lamps on the carriage gates which showed, when closed across the highway, a white light; and when closed across the line, a red one. The deceased lived near the crossing on the other side of the line, and called at the gate-keeper's lodge one December night to ask if his wife was there, and found the gate-keeper sitting in his lodge reading. He was told his wife was not there, and left the lodge. Though a train had been signalled, the gate-keeper gave him no warning, and did not go out to signal the train in accordance with his accustomed duty. There was evidence from which it might be inferred, that the deceased knew that the gate-keeper used to go out to signal an approaching train. He was run down and killed by a train going over the crossing

Another case of a plaintiff being misled into a feeling of security is *Smith's case*.

at about forty miles an hour. The train carried lights which could be seen by any one about to go over the level crossing for a distance of 600 yards. Ten seconds before the train passed the crossing, the engine-driver whistled. The engine-driver's evidence was, that he saw the white light on the carriage gates, but did not receive any hand-signal from the gate-keeper. An action was brought by the widow of the deceased; and it was held by the Court of Appeal, that upon these facts there was evidence to go to the jury of negligence by the defendants by which, and not by any negligence of his own, the deceased met his death; and the judge at the trial (Day, J.) was right in not withdrawing the case from the jury.

Where a plaintiff is misled into a feeling of security, his not taking the precaution of looking about him will not amount to negligence.

Lord Esher, M.R., after stating that there was evidence that might lead to the conclusion that the deceased knew of the duties the gate-keeper had to perform, added: "That being so, they (the jury) might, on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to presume that, as Judges (the gate-keeper) remained in his house, no train was coming, and therefore he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might be otherwise necessary." This view, which was adopted by other members of the Court, shows very strongly that, though a man has the opportunity of seeing that a train is approaching, his not making use of this opportunity would not amount to negligence on his part, if by the conduct of the company's servants, he was reasonably led to believe that the line was safe to cross, and that therefore he need not look out for himself. It will be noticed that this view goes much further in the direction of benefiting a plaintiff than that entertained in the earlier cases; and follows the opinion expressed by Lord Cairns in *Slattery's case* (*ante*, p. 137), to the effect that, if a man knows the practice at a station to be that an approaching train would

whistle, the jury might come to the conclusion that the absence of whistling had thrown him off his guard, and had led him reasonably to suppose that it was unnecessary for him to look out before crossing to see whether a train was coming.

But the Court, in dealing with *Smith's case*, had also to consider the effect of *Wakelin's case* (*ante*, p. 104), which decided, that where the evidence was equally consistent with the accident having been caused by the plaintiff's own negligence as with its having been caused by the defendants' negligence, the case ought to be withdrawn from the jury; but in the opinion of the judges this was not such a case. Kay, L.J., however, in dealing with this point, after mentioning the effect of *Wakelin's case*, made use of the following criticism: "I venture to say, with all respect for those who hold a different opinion, that as long as we have trial by jury and juries are judges of fact, it should be a very exceptional case in which the judge could so weigh the facts and say that their weight on one side and the other was exactly equal. There may be such cases, and the House of Lords seems to have considered that there might be. I can only say that I think they must be very rare, and I certainly do not think that the present case is one of them."

Kay,  
L.J.'s,  
criticism  
on *Wake-  
lin's case*.

The case of *Williams v. G.W. Ry.*, L.R. 9 Ex. 157 (*ante*, p. 91), shows that the omission to erect a gate at a level crossing over a public footpath, may be so connected with an accident that occurs there that, without other evidence, the jury may reasonably come to the conclusion that it gave occasion to the accident; and is therefore evidence of negligence. In that case, the plaintiff was a child of four years of age, who had been sent on an errand. He was shortly afterwards found lying on the level crossing, where, contrary to the 61st section of the Act, no gate had been erected, one of his feet having been cut off by a passing train.

Omission  
to perform  
statutory  
duty to  
erect gates  
may be  
evidence  
of negli-  
gence.





along it; although they are on the highway by permission of the owner of the soil. The cattle were not using the highway as a highway, and were, if not trespassing, yet straying upon it. Even if the cattle had belonged to the owner of the soil, no one has the right to use a highway in a manner inconsistent with its being a highway; and a highway may not be used for the purpose of cattle straying upon it. In *Dawson's case*, the horse was not on a highway, but in a field virtually in the occupation of its owner. Channell, B., decided *Luscombe's case* on the ground that, as the cattle belonged to a farmer and were allowed to graze in a wood adjoining his farm, through which ran a highway, the property in the soil of which was in the owner of the wood, he was not in occupation of it. "I do not think it is possible to say that the cattle of the owner of this tenement, who had only a licence to depasture his cattle in the wood through which the road went, can be considered to be cattle of either the owner or the occupier of the adjoining land within the meaning of this section."

Where a company are compelled under sec. 68 to erect and maintain fences, the obligation is, however, absolute and permanent, and is not affected by the limitation of time with regard to "further accommodation works" contained in sec. 73, by which they are not compelled to make further accommodation works after five years from the opening of the railway for public use. A company, therefore, are responsible to the occupier of adjoining land for injury to his cattle arising from their neglect of the duty to make and maintain fences, which is thrown upon them by sec. 68; although no fences were made within five years (the limitation under sec. 73) of the opening of the railway for public use.<sup>1</sup>

Though a railway company may not be liable under sec. 68 for not properly fencing their line, they may be liable under sec. 47 for not doing so at a level crossing. A

The duty to fence imposed by sec. 68 is an absolute one.

Duties under sec. 47: the scope

<sup>1</sup> *Dixon v. G.W. Ry.* (1897), 1 Q.B. 300.

Duties of  
company  
to fence  
against  
cattle.

Distinction  
between  
cattle  
being  
taken  
along a  
highway,  
and  
straying  
upon it.

The decisions under sec. 68<sup>1</sup> of the Railway Clauses Consolidation Act, 1845, are somewhat peculiar. It was long ago held<sup>2</sup> that if a man is driving his cattle along a road which runs alongside a railway, or even allowing them to be upon it, he is entitled to protection under that section, as an "occupier" of land adjoining the railway; but if his cattle are straying on the road, or are driven there by some one else without his consent, he is not an "occupier" of the road, and sec. 68 does not apply to him. In *Dawson v. Midland Ry.*, L.R. 8 Ex. 8, the plaintiff's horse got on to the railway by reason of a defective fence, and was killed by a train. The plaintiff hired of the occupier of the land adjoining the defendants' line, a stable for his horse. The horse was allowed to graze on the land during the day. One night it escaped from the stable on to the land, and, through a defective fence of the defendants', got on to the line. It was held that the plaintiff was entitled to the benefit of sec. 68. Kelly, C.B., said: "The horse was lawfully in the field, from which it escaped through defect of the defendants' fences. It is said that the statutory duty is only imposed on the defendants as far as regards 'owners or occupiers' of the adjoining land. But here we must take it that the horse was upon the close with the licence of the occupier; and that being so, in my judgment the defendants are liable." And Bramwell, B., said that the statute was for the benefit of all persons lawfully using adjoining land. In *Luscombe v. G.W. Ry.* (1899), 2 Q.B. 313, it was held that a railway company, whose premises adjoin a public highway, are not bound to fence against cattle straying upon the highway, and not merely passing

<sup>1</sup> Sec. 68 enacts that a railway company shall make and maintain "for the accommodation of the owners and occupiers of lands adjoining the railway" . . . sufficient fences for separating the land taken from the adjoining lands not taken, and protecting such lands from trespass, or the cattle "of the owners or the occupiers thereof" from straying thereout by reason of the railway.

<sup>2</sup> *M.S. & L. Ry. v. Wallis*, 14 C.B. 213.

along it; although they are on the highway by permission of the owner of the soil. The cattle were not using the highway as a highway, and were, if not trespassing, yet straying upon it. Even if the cattle had belonged to the owner of the soil, no one has the right to use a highway in a manner inconsistent with its being a highway; and a highway may not be used for the purpose of cattle straying upon it. In *Dawson's case*, the horse was not on a highway, but in a field virtually in the occupation of its owner. Channell, B., decided *Luscombe's case* on the ground that, as the cattle belonged to a farmer and were allowed to graze in a wood adjoining his farm, through which ran a highway, the property in the soil of which was in the owner of the wood, he was not in occupation of it. "I do not think it is possible to say that the cattle of the owner of this tenement, who had only a licence to depasture his cattle in the wood through which the road went, can be considered to be cattle of either the owner or the occupier of the adjoining land within the meaning of this section."

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Duties under sec. 47: the scope

<sup>1</sup> *Dixon v. G. W. Ry.* (1897), 1 Q.B. 300.

of the  
section  
con-  
sidered.

company had erected gates at a crossing, of the width of the road; and also a swing gate upon a piece of land beyond the limit of the road, on the same line with the gates. The plaintiff's horses, after straying from his land, arrived at the gates of the level crossing, and finding them closed, turned to the swing gate, and forced their way through it, owing to the defective condition of the posts. They got on to the line, and were killed by a train. It was held,<sup>1</sup> that there was evidence of a breach of the defendants' obligation under sec. 47 to fence in the railway from the road, and that they were liable for the loss of the horses. It was urged for the defendants, that by erecting the gates across the road, they had fully complied with the section. But it was said by Lord Esher, M.R., that the section should be construed so as to give protection to persons using the road to which the defendants had brought their line; and in this case it was obvious that if a place beyond the width of the road, in a line with the wide gates, were left unprotected, the consequence would be, that cattle going along the road in the ordinary way would be almost certain to get upon the railway beyond the gates. "I think," he said, "that the company are bound to make the gates, not merely the width of the road, but of such width that when they are closed they will fence in the railway so as to prevent cattle using the road from entering on the railway—not merely from the level crossing; . . . and whatever the width of the road, if it is necessary to do so in order to give that protection, the gates must be made wider than the road." Lindley, L.J., adopted this view, without subjecting the language of the section to critical examination. The general scope of the section must be looked at: "The object of the section is that the railway shall be effectually fenced off from roads which it crosses on a level, and the company are bound to maintain 'sufficient gates' across the road; . . . and the pith of it is 'that the gates shall

<sup>1</sup> *Charman v. S.E. Ry.*, 21 Q.B.D. 524.

be of such dimensions and so constructed as, when closed, to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway.'” It was also held that there was no case against the company under sec. 68.

In addition to the duty cast by statute upon a railway company in respect of level crossings across a highway, there is also a duty on them to keep the crossing in a proper state of repair for the passage of carriages across the rails. The principle is, that where persons are authorized by statute to create what would otherwise amount to an indictable nuisance, such as making cuts across a highway, they are bound, without any express enactment, to put and keep up for the public a proper substitute for the old way. Accordingly, in *Oliver v. N.E. Ry.*, L.R. 9 Q.B. 409, the defendants were held liable under the following circumstances. The plaintiff was driving a four-wheeled dog-cart along the highway where the defendants' railway crossed the highway on a level; and in consequence of the rails being too high above the level of the road, the hind wheels of the cart were caught by the rails, and the carriage was torn in two.

Duty to  
keep the  
crossing  
in repair.

## CHAPTER XXV.

### *Innkeepers' liability—Negligence of guests.*

The  
common-  
law  
liability  
of an  
innkeeper.

THE common-law liability of an innkeeper has been limited by 26 & 27 Vict. c. 41, the Act of 1863, which is called "an Act to amend the law respecting the liability of innkeepers, and to protect certain frauds upon them." The liability at common-law arose with the view of protecting the guest from the frauds of the innkeeper; while the Act was passed to prevent frauds being perpetrated upon the innkeeper. "Thus the whirligig of time brings in his revenges."

The Inn-  
keepers  
Act.

In the days of long ago, it was necessary to protect travellers against the possibility of innkeepers acting collusively with highwaymen and other feloniously disposed persons who infested the roads. At common-law, an innkeeper was liable for the property of his guest which was stolen while he remained as his guest; unless the guest by his own misconduct induced the loss. The leading case upon the subject of the common-law liabilities of an innkeeper as regards the property of his guests, is *Calye's case*.<sup>1</sup> By the Act of 1863 an innkeeper shall not be liable for the loss of or damage to the goods and property of his guest (except as to horses and carriages) to a greater amount than £30; except—

- (1) where they have been "stolen, lost, or injured through the wilful act, default, or neglect" of the innkeeper or his servants;

<sup>1</sup> Sec 1 Smith's L.C., 11th ed., p. 119.

- (2) where the goods or property have been expressly deposited with him by his guest for safe custody: in which case the innkeeper may require as a condition of liability that the goods shall be placed in a box fastened and sealed by the person depositing the property.

The innkeeper is bound to receive his guests' property for safe custody; and if he does not, or through his default the guest is unable to deposit them, he shall no longer be within the protection of the Act. Finally, to bring the innkeeper within the Act, he is required to exhibit a copy of the first section of the Act "in a conspicuous part of the hall or entrance to his inn."

If a man goes to an hotel merely to dine or take food, not intending to stay at the hotel or inn for any longer time than is necessary for that purpose, and hangs up his hat and coat in the place provided for them, and they are stolen, the innkeeper will be liable without any evidence of negligence being offered by the plaintiff. The relationship of innkeeper and guest is established, although the guest is only using the inn for the temporary purpose of obtaining refreshment;<sup>1</sup> and in the opinion of Kennedy, J., this is so, whether the guest is a "traveller" or not, whatever a "traveller" may mean. But if a man goes for refreshment to a restaurant, which is not also an inn or hotel, and his coat is stolen while he is there, this not being an inn, there is no such relationship of innkeeper and guest. The restaurant-keeper is a bailee of the coat, and to make him liable it is necessary to show that he has been guilty of negligence while it was in his custody.<sup>2</sup>

This relationship of innkeeper and guest, though, as we

<sup>1</sup> *Orchard v. Bush* (1898), 2 Q.B. 284; *Bennett v. Mellor*, 5 T.R. 273.

<sup>2</sup> *Ulltzen v. Nicols* (1894), 1 Q.B. 92. See also *Reg. v. Rymer*, 2 Q.B.D. 136.



*Strauss's case.*

have seen, it is not affected by the length of the stay at the inn, only arises if a man actually becomes a guest, and only continues while he remains so.<sup>1</sup> In *Strauss v. The County Hotel and Wine Co.*, 12 Q.B.D. 27, the plaintiff arrived at Carlisle intending to spend the night at the defendants' hotel. He gave his luggage at the station to one of the defendants' porters to take to their hotel. He found a telegram awaiting him at the hotel and, after reading it, decided to go on to Manchester. He went into the coffee-room to dine, but not finding what he wanted there, he went, by the waiter's advice, to the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. On his way there, he met the porter with his luggage and told him to lock it up till he was ready to start for Manchester. The luggage was locked up in a room adjoining the refreshment-room; and when the plaintiff afterwards arrived at the platform of the station, two packages from amongst his luggage were missing. The learned judge who tried the case (Stephen, J.) non-suited the plaintiff, on the ground that there was no evidence that the plaintiff ever became a guest of the defendants at their inn. On a rule being obtained to set aside the non-suit, the non-suit was upheld, Lord Coleridge, C.J., finding no ground for saying that the plaintiff was a guest in any sense at the time when his luggage was lost; and Mathew, J., thinking that the plaintiff at no time became a guest. There was no proof of negligence on the defendants' part, so as to establish any liability there might have been on the defendants as bailees.

An observation which may be made on this case is suggested by *Orchard v. Bush* (*ante*, p. 339). Although

<sup>1</sup> The character of guest attaches only while the guest is a traveller. After staying a long time at an inn, he may as a matter of fact be found to be a traveller no longer: *Lamond v. Richard* (1897), 1 Q.B. 541; and see *Browne v. Brandt* (1902), 1 K.B. 696.

it could be said that the plaintiff did not become a guest at the inn as regards intending to pass the night there, because as soon as he arrived at the hotel he expressed his intention of going on at once to Manchester; is it clear that he was not a guest by reason of his taking temporary refreshment at a place connected with the inn? Or, would he have been a guest if he had remained in the coffee-room to dine? Was he not, under the circumstances, constructively at least, dining at the inn? Then, as regards the kind of property he had with him, though in *Orchard v. Bush* it was his coat merely for which the innkeeper was liable, and it might be said that a temporary guest cannot impose a liability on the innkeeper in respect of the safe custody of his impedimenta; yet the innkeeper in this case, through his servant, undertook to accept the charge of them. In this view, the innkeeper would be liable to the extent of £30, there having been no contributory negligence on the guest's part.

In order that an innkeeper should be relieved of his statutory liability under the Act to the extent of £30, for the loss of a guest's property, the innkeeper must show contributory negligence on the part of the guest. But to enable the guest to claim more than £30, he must show that the loss occurred through the "wilful act, default or neglect" of the innkeeper.<sup>1</sup> It is, however, necessary to remember that in order to claim the benefit of the Act, the innkeeper must conspicuously display a correct copy of the first section of the Act. In *Spice v. Bacon*, 2 Ex. D. 463, the landlord unintentionally exhibited a notice which omitted the word "act" after "wilful," the sentence running, "where such property shall have been stolen, lost, or injured through the wilful default or neglect of such innkeeper or any servant in his employ." This unfortunate omission was sufficient to place the innkeeper outside the benefit of the Act. It was not a merely clerical

How the innkeeper can relieve himself of his statutory liability; and how a guest can claim more than the statutory limit.  
*Spice v. Bacon.*

<sup>1</sup> *Medawar v. Grand Hotel Co.* (1891), 2 Q.B. 11.

error, but a substantial one. The legal effect of the notice as it stood was, that it contained no statement which admitted the continuance of the common-law liability for the goods or property stolen or injured through the wilful act of the innkeeper or his servants. Speaking of the omission of the word "act," Lord Cairns, L.C., said: "The result is this: if it could be supposed that, in a case like the present, the goods were actually stolen by a servant in the employment of an innkeeper, the notice, as it now runs, would be a notice asserting that the common-law liability had ceased even in that case." The omission therefore altered the operation of the section; as a mere verbal omission not material to the sense would not have done. "The notice is therefore," said the Lord Chancellor, "not a notice stating the law in the way the first section of the statute states it. I feel obliged to hold that the claim for protection under the statute fails." It had already been held in *Squire v. Wheeler*, 16 L.T., N.S. 93, that the word "wilful" in the section applies only to the word "act," and not also to the words "default, or neglect."

Negligence on the guest's part: *Oppenheim's case*.

We have seen that where an innkeeper wishes to relieve himself of his liability to the extent of £30, he must prove circumstances which go to show that the loss was induced by the guest's negligence. Such circumstances were successfully shown in the case of *Oppenheim v. White Lion Hotel Co.*<sup>1</sup> The plaintiff went to the defendants' hotel at Bristol, an hotel of considerable size, to stay the night there. He had with him a sum of £27 in a bag. Without making any ostentatious show of this money, he took the bag out in one of the public rooms, for the purpose of taking sixpence out of it. When he went to bed, leaving his trousers, in which was the bag of money, on a chair by his bedside, he did not lock or bolt his bedroom door. The door was provided on the inside with a bolt and a lock with a key in it, both in good repair

<sup>1</sup> L.R. 6 C.P. 515.

and condition ; and there was no notice warning him to lock or bolt his door. In the morning he found that the bag of money had been stolen. The County Court judge, before whom the case was tried, asked the jury whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken, and the jury found for the defendants. On appeal, this direction was held right. The question was one of degree for the jury. "I agree," said Montague Smith, J., "that there is no obligation on a guest at an inn to lock his bedroom door.<sup>1</sup> Though it is a precaution a prudent man would take, I am far from saying that the omission to do so alone would relieve the innkeeper from his ordinary responsibility. The law of *Calve's case* may remain untouched. But the fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury. The weight of it must, of course, depend upon the state of society at the time and place. What would be prudent in a small hotel in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol." The other circumstance to which the learned judge alluded, was the fact of the plaintiff having taken out his bag in the public room. Keating, J., took the same view ; while Willes, J., does not in the course of his judgment, appear to rely at all upon the plaintiff having exposed his money. "By omitting to lock his door," he said, "the jury might well think that the guest chose to take the risk of robbery upon himself, and that he ought to have taken more care." Whether omitting to lock the bedroom door is or is not evidence of negligence depends, therefore, upon "the state of society at the time and place." While at ordinary times it might not be negligent to do so at a small inn in a public place, it might be so at a time

When  
omitting  
to lock  
bedroom  
door is  
negli-  
gence.

<sup>1</sup> And see *Morgan v. Ravey*, 30 L.J. Ex. 131.

when races in the neighbourhood caused suspicious persons to be about the inn.

*Armistead v. White*:  
another  
case of  
guest's  
negli-  
gence.

*Armistead v. White*, 20 L.J.Q.B. 524, decided in 1851, before the Act, also was a case where the landlord was relieved of his common-law liability by the negligence of his guest. The plaintiff, who was a commercial traveller staying at the defendant's inn, left his box, with the defendant's assent, in the commercial room. The lock was insecure, and the box could be opened without a key; and he had, before the loss, ostentatiously opened the box in the presence of others, showing that it contained money, and could be opened without a key. On the money being stolen from the box whilst the plaintiff was still a guest, he brought an action against the landlord. All these circumstances were held to make it a question of fact for the jury whether the plaintiff was not guilty of "gross negligence;" and Lord Campbell, C.J., said he doubted whether, in order to get rid of the innkeeper's liability, *crassa negligentia* on the part of the guest must be shown. The facts at least furnished evidence of negligence, and it was therefore a question for the jury.

## CHAPTER XXVI.

### *Negligence of solicitors—Statute of Limitations—Medical men—Architects and surveyors.*

WE have seen that skilled persons impliedly undertake to exercise their skill in matters pertaining to it; and a solicitor who is negligent as a solicitor is liable either in tort or in contract to his client. (See *Turner v. Stallibrass* (1898), 1 Q.B. 56, *ante*, p. 64, and cases there cited.)

So long ago as 1830, Tindal, C.J., in *Godefroy v. Dalton*, <sup>Duties of a solicitor.</sup> 6 Bing. 460, thus dealt with the duties of a solicitor in respect to the exercise of his skill. "It would be extremely difficult," he said, "to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a case is bounded; or to trace precisely the dividing-line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this Court; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a case as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of a nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession."

Not liable  
for error of  
judgment.

In all cases involving the exercise of professional skill there is no guarantee that the advice given is absolutely right. Nor is it necessarily evidence of want of skill that it turns out not to be right. An error of judgment is not negligence, and a solicitor in giving his advice does not warrant its soundness. There are certain things he is bound to know which form part of the equipment of a solicitor. If his advice is based upon ignorance of them, he has not satisfied his obligation and undertaking to exercise the ordinary skill of a solicitor. But if his advice is diligently given, and is based on a view of the law involving questions of doubt; though the view he takes is subsequently found to be an erroneous one, he is not guilty of professional negligence. *Blair v. Assets Company* (1896), A.C. 409, a Scotch case, was one where solicitors were sought to be made liable for negligence because they had wrongly advised, not on the facts, but on the law, having based their decision on a case decided unanimously by the Court before whom the matter, on which the solicitors were advising, would have to come. Lord Herschell, when dealing with the charge that the solicitors were negligent because they had given erroneous advice upon a question of law, said: "The utmost that could be said is, that, subsequently to that decision, when the case came before this House, where it was reversed upon another point, one of the noble and learned lords expressed a doubt whether, upon the point which is now of importance, that case was rightly decided. It was no part of the necessary duty of the appellants (the solicitors) to discuss the questions of law which might arise upon the matters upon which they were asked to advise. I can see not the faintest shadow of ground for alleging that, in giving the advice they did, they displayed any want of care whatsoever. That would be enough to dispose of the case." Lord Shand adopted the view of one of the learned judges below, who said: "It was their duty to form their own opinion and to advise

accordingly. But it was not their duty, nor according to their instructions, to reason out the matter, to say whether their opinion was given with confidence or hesitation, or to quote the authorities." While Lord Davey declared that it seemed to him "extravagant to hold that law-agents were guilty of actionable negligence because they gave advice to their clients which involved the assumption that a recent and unanimous decision of the very judges before whom the question would come was correct."

Where it was sought to establish negligence against a solicitor in and about advice given as to the securities on which the plaintiff had advanced his money, it was held that as the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions had been submitted to the client's judgment, no negligence had been established.<sup>1</sup>

Liability in respect of advice given upon investing a client's money.

But where a solicitor is instructed to take proceedings against the acceptor of a foreign bill, it is his duty, when he is conversant with the law of the foreign country, first to ascertain whether his client's bill was complete by special indorsement as required by the law of that country, before bringing an action in his client's name. Where he did not do so, although he might have been misled by what his client said, he was held to be guilty of such negligence as disentitled him to recover the costs of the abortive proceedings.<sup>2</sup> This was neglect in respect of a matter within his province, it being admitted that he knew the law of the foreign country.

It is negligence in a solicitor not to tell his client that his suggested action is sure to fail, or is an improvident one; for it is his duty towards his client to give him that advice. A solicitor once allowed his client to bring an action, at much expense to himself, in which he could not recover

Not to tell a client that his action is ill-advised, is negligence.

<sup>1</sup> *Chapman v. Chapman*, L.R. 9 Eq. 276.

<sup>2</sup> *Long v. Orsi*, 26 L.J.C.P. 127; and see *Cox v. Leech* (*post*, p. 348).



more than nominal damages; and Lord Tenterden, C.J., thus addressed the solicitor at the conclusion of the case: "You say in your evidence, that you neither persuaded nor dissuaded the plaintiff, when he applied to you on the subject of this action. In that respect you did not do your duty. It was your duty to tell him that he ought not to bring the action."<sup>1</sup>

Even where a solicitor has his client's positive instructions to proceed, it is still his duty to tell him that the action will not succeed, if that is his opinion.<sup>2</sup>

Defence of  
negli-  
gence on  
action for  
solicitor's  
costs.

A solicitor who has been guilty of negligence cannot recover his costs, and his bill being considered as a whole, no part is recoverable; unless under circumstances where portions of the costs are quite unconnected with the alleged negligence, as in *Cox v. Leech*, 26 L.J.C.P. 125. There, a solicitor had instituted proceedings for his client in the Mayor's Court, where there was no jurisdiction to issue a commission to examine witnesses in India, it being clear that it was necessary to enable his client to establish his case that such commission should be obtained. It was held to be negligence on the solicitor's part not first to have ascertained that the Mayor's Court did not possess this power; but as to certain perfectly proper letters he had written before proceedings, applying for the money claimed by his client, he was allowed to recover the cost of them.

Where  
negli-  
gence is  
set up on  
taxation  
of costs  
between a  
solicitor  
and his  
client.

On the taxation of costs between a solicitor and his client, the Taxing Master can disallow the costs of proceedings, in an action conducted by the solicitor, which were occasioned by his negligence or ignorance. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the solicitor.<sup>3</sup>

Where a solicitor brings his action to recover his costs,

<sup>1</sup> *Jacks v. Bell*, 3 C.P. at p. 317.

<sup>2</sup> *In re Clark*, 1 De G. M. & G. 43.

<sup>3</sup> *In re Massey and Carey*, 26 Ch. D. 459.

the defence of negligence must show that the result of the negligence alleged rendered his services altogether fruitless, and that this result was wholly due to that negligence. These are facts for the jury to determine.<sup>1</sup> But it is sufficient to sustain a counter-claim by the defendant, if he shows that the proceedings were only in part fruitless by reason of the solicitor's negligence.

A solicitor can in some cases protect himself by taking the opinion of counsel. He is not answerable for counsel's neglect;<sup>2</sup> nor when he has obtained counsel's opinion upon a properly drawn case, and acted upon it. But in matters of practical procedure which ought to be within his knowledge as a solicitor, he is not protected by the opinion of counsel, unless they involve questions of doubt.<sup>3</sup>

Where solicitor is protected by taking opinion of counsel.

In actions for negligence, the Statute of Limitations begins to run from the time of committing the injurious act, and not from the discovery of it.<sup>4</sup> Though this is so as to negligence on the part of a solicitor, if, apart from negligence, the special relationship of trustee and *cestui que* trust exist between the solicitor and the client, and a breach of trust or of moral duty is committed by the solicitor, the Statute of Limitations does not apply. In *Dooby's case (infra)* a mortgage, which subsequently proved to be insufficient, was made through a solicitor, and more than six years afterwards the client brought an action against the solicitor for damages. It was held on the facts that the client had herself approved of the mortgage, and that the solicitor merely did the legal business connected with it, and was not in the position of a trustee, and therefore the statute applied. Kekewich, J., divided the cases of employing a solicitor to advance money on mortgage into three classes: he may be employed to invest in a

Statute of Limitations: when it begins to run in actions of negligence.

<sup>1</sup> *Bracey v. Carter*, 12 A. & E. 373.

<sup>2</sup> *Lowry v. Guilford*, 5 C. & P. 234.

<sup>3</sup> *Laidler v. Elliott*, 3 B. & C. 738; *Godefroy v. Dalton* (*ante*, p. 345).

<sup>4</sup> *Dooby v. Watson*, 39 Ch. D. 178.

particular mortgage; or to find securities to be approved by the client, and then to invest the money; and, lastly, he may be employed to find the securities and invest the money, the client taking little or no part in the matter. In this last case the solicitor accepts a very onerous duty, "because," said the learned judge, "beyond providing the mortgages, beyond doing the merely legal business, he really undertakes the responsibility to his client of seeing that they are good mortgages, on which the money may be safely invested. That is within the ordinary duty of solicitors according to the practice of the profession, and is a more onerous duty, and one which some solicitors, I believe, decline to take."

If the solicitor acts either in the first way or the second—assuming, as to the second, that the mortgage is approved by the client—then he is free, except from a charge of negligence; and this is barred after six years by the Statute of Limitations, which constitutes a good defence. But if he falls within the last class, being responsible to his client for selecting a good mortgage, the question will be whether, having accepted the money on trust to invest in a good mortgage, he is not responsible for having selected a bad one. In deciding that question, the fact that he did not employ an independent valuer, or did not take other proper means of ascertaining the value of the mortgaged lands, would be of vast importance. The point would be, whether he had discharged his duty as a trustee. But these facts would only amount to negligence if he had been employed in the first two ways pointed out, which would not make him a trustee beyond his duties as a solicitor; and, being negligence, an action against him six years after making the investment would be barred.

The Statute of Limitations enacts that the actions therein mentioned shall be brought "within six years next after the cause of such action or suit, and not after;" and the expression "cause of action" arises at the time when

the debt could first have been recovered by action. The right to bring an action may be postponed by the terms of the contract, or may arise on various events; and it is held that the statute runs from the earliest time at which the action could be brought, which forms a slight qualification of the rule above stated, *i.e.* that it runs from the time of the doing of the injurious act.<sup>1</sup> Where, however, the original act was not wrongful, but only becomes so by reason of damage subsequently arising, as where (as in *Darley Main Colliery v. Mitchell*, 11 App. Cas. 127, *post*, p. 387) a new subsidence occurred from an excavation, after damages had been recovered for the then injury occasioned by the original excavation, there is no "cause of action" against which the Statute of Limitations runs, until the injury occurs.<sup>2</sup>

Except in such cases as have already been mentioned, a solicitor who puts a properly drawn case before a barrister, and acts upon his opinion, is protected against an action for negligence, and he is not answerable for counsel's neglect.<sup>3</sup> The position of a barrister is unique amongst professional men. His remuneration is theoretically an honorary one; he cannot sue for his fees, and, on the other hand, he cannot be sued for negligence. This position has always been jealously maintained, no less in the public interest, than in that of the profession. "I think it is of the utmost importance," said Lindley, L.J.,<sup>4</sup> "that the Court should not assist barristers to recover their fees. If they do so, the whole relation between a barrister and his professional client will be altered, and a door will be opened which will lead to very important consequences as regards counsel. The inevitable result will be to do away

Position of  
counsel.

<sup>1</sup> *Reeves v. Butcher* (1891), 2 Q.B. 509, in which *Hemp v. Garland*, 4 Q.B. 519, was approved by the Court of Appeal.

<sup>2</sup> And see *Crumbie v. Wallsend Local Board* (1891), 1 Q.B. 503.

<sup>3</sup> *Lowry v. Guilford*, 5 C. & P. 234 (*ante*, p. 349).

<sup>4</sup> *Le Brasseur v. Oakley* (1896), 2 Ch. at p. 494.

with that which is the great protection against an action for negligence by his client."

Lopes, L.J., in the same case said: "I entirely agree that the Court cannot, and ought not to, assist a barrister in recovering his fees. The payment is only a matter of honour. It is open to counsel, if he thinks fit, not to accept a brief unless the fee is prepaid; and it would be contrary to all the decisions, and I think against good policy, to hold that counsel's fees are recoverable. The decision of the Court of Common Pleas in *Kennedy v. Brown* (13 C.B., N.S. 677) has always been acted upon, and it establishes the unqualified doctrine that the relation of counsel and solicitor renders the parties mutually incapable of making any legal contract of hiring and service in regard to litigation. That rule has existed for a long time, and, speaking for myself, I should be very sorry to see it in any way impugned."

In the case where these remarks fell from the learned Lords Justices, a barrister had employed solicitors in a private matter of his own, and under the common order to tax their costs, he sought to set off fees due to him from them in respect of matters in which they had professionally employed him; and it was held that he could not do so.

The duty of counsel is to advise his client out of Court, and to act for him in Court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.<sup>1</sup> "I apprehend," said Lord Esher, M.R., "that it is not contended that this power cannot be controlled by the Court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce

<sup>1</sup> *Matthews v. Munster*, 20 Q.B.D. 141.

some injustice, the Court has authority to overrule the action of the advocate."

The authority given to counsel includes a power to compromise an action.<sup>1</sup> Fry, L.J., in the same case said: "Prior to the compromise" (which it was the object of the application to set aside) "counsel had received no instructions as to a compromise. In the compromise itself there was nothing collateral to the action, nothing unjust, and there was no mistake, in fact, on the part of counsel. In the absence of these matters it was plainly the duty of counsel to do that which he considered best for his client. I think it would be disastrous—I do not say in the interest of the bar, but in the interest of litigants—if we had to decide otherwise, for such a result would often necessitate the refusal, because the client happened to be absent, of an offer of compromise highly advantageous to him."

In all cases of skilled or professional labour, where a man publicly practises a profession, he holds himself out as being properly equipped for its due performance. He represents and undertakes, therefore, that he is possessed of the necessary and customary skill pertaining to that calling or profession, whether he is a professional man or a skilled artisan.<sup>2</sup>

A medical man, as any other skilled person, is not answerable for an error of judgment, but he is bound to exercise such degree of skill as ordinarily belongs to his profession. What that standard is cannot, however, be defined, and it becomes a question for the jury to determine whether such skill has or has not been exercised in the particular circumstances before them. It is obvious that in performing that duty the jury is placed in a peculiar and difficult position. In the course of summing up a case to a jury, where it was alleged that a medical man had

<sup>1</sup> See, as to the binding effect of a compromise arranged by counsel, *Neale v. Lady Gordon-Lennox* (1902), A.C. 465.

<sup>2</sup> *Harmer v. Cornelius*, 28 L.J.C.P. 85.

been negligent, Erle, C.J., said<sup>1</sup>: "A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that . . . even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such extent as to lead to the bad result." That is to say, that though the defendant may have exhibited a want of care in this or that matter, no liability for negligence attaches to him, unless the injury complained of was caused by, or arose out of, that particular want of care.

If an unqualified assistant is left in charge by a medical man, and injury results to some one from his acts, the master would be civilly, and under certain circumstances, criminally liable. "We need hardly say," said Hawkins, J., in delivering the judgment of the Court in a case where an unqualified assistant of a duly qualified chemist was being dealt with under the Pharmacy Act, 1868, "that if mischief arose by reason of a master negligently leaving an unqualified person in charge of his poisons, no punishment of the assistant under sec. 15 would exonerate his master from his civil liability to any person injured, nor, if death ensued through such negligence (if a jury found it to be of a criminally culpable character), would he be exonerated from a liability to a charge of manslaughter."<sup>2</sup>

Architect  
and  
surveyor:  
when  
in the  
position of  
quasi-

Where the exercise of judgment or opinion on the part of a third person is necessary between two persons, so that the third person has to exercise his judgment impartially between the two, he is in the position of a quasi-arbitrator, and is not liable to an action for negligence or unskilfulness

<sup>1</sup> *Rich v. Pierpont*, 3 F. & F. 35.

<sup>2</sup> *Pharmaceutical Society v. Wheeldon*, 24 Q.B.D. at p. 690.

in discharging his quasi-judicial functions.<sup>1</sup> This position is occupied by an architect or surveyor as between the building owner and the contractor, where, by the building contract, the architect has to give certificates from time to time as to the value of the work done leading up to his final certificate; the architect's certificate to be binding on the parties.<sup>2</sup> In such a position, the architect has a duty both towards his employer, the building owner, and towards the builder, to exercise his judgment impartially between them; and no action of negligence lies against an arbitrator, or a person in the position of an arbitrator. Fraud on the architect's part, or fraudulent collusion with one of the contracting parties, would render him liable, but nothing short of this. An architect is not always in this position, and he may be, under the same contract even, as regards the giving of certificates, in the position of an arbitrator; and as regards other duties undertaken by him, merely in the position of an agent of, or skilled person employed by, the building owner. In the latter case he would be liable, as any other skilled person, if he performed his duty negligently or unskilfully. The duty he would owe would be to his employer alone, and if unskilfully discharged, he would be liable to an action for negligence by his employer. *Rogers v. James*, 8 Times Rep. 67, was a case of that kind, where an architect was held to be liable for negligence in an action by his employer, in not properly supervising the work under a building contract which he was employed to supervise by the building owner. But in the case where he has to give certificates binding upon the parties, involving the exercise of quasi-judicial functions; though he is not an arbitrator strictly, so as to be within the Common Law Procedure Act or the Arbitration Act, yet he acts in a capacity which is described as that of a quasi-arbitrator;<sup>3</sup> and is therefore not liable in an action of negligence.

<sup>1</sup> *Pappa v. Rose*, L.R. 7 C.P. 32, 525.    <sup>2</sup> *Stevenson v. Watson*, 4 C.P.D. 148.

<sup>3</sup> *Wudsworth v. Smith*, L.R. 6 Q.B. 332.



The same principle applies where an average adjuster is appointed to make an adjustment in the case of a ship which has incurred a general average loss, so as to settle the proportions of the loss to be borne by the parties. The average adjuster is then clothed with the same quasi-judicial functions.<sup>1</sup>

The position of the architect again came up for consideration in the two cases of *Chambers v. Goldthorpe* and *Restell v. Nye*, which were tried together.<sup>2</sup> There, the architect was employed by the building owner to supervise the erection of some houses by a contractor; and the building contract provided for payments on account during the work, and of the balance on completion, upon certificates of the architect; and also that the architect's certificate, showing the final balance due to the contractor, should be conclusive evidence that the works had been duly completed, and that the contractor was entitled to receive payment of the final balance. It was held by a majority in the Court of Appeal, that the architect, in ascertaining the amount due, and certifying for it under the contract, was in the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in discharging those functions. On a point that was taken, and which had been discussed in previous cases, that the architect could not be acting as an arbitrator because no dispute had arisen between the building owner and the contractor, Collins, L.J., said: "There is involved in such an agreement an underlying assertion of possible difference as to the right to be so ascertained by the third person; and the person who, on notice of such an agreement, accepts the responsibility of deciding the matter between the parties must, in my opinion, have duties to both of them. It is not, I think, necessary that there should be a formulated dispute in order to clothe such a

<sup>1</sup> *Tharxis Sulphur Co. v. Loftus*, L.R. 8 C.P. 1.

<sup>2</sup> 1901, 1 Q.B. 624.

person with the duties, and confer on him the immunities, of a quasi-arbitrator."

The remarkable circumstance about this case is, that so distinguished a judge as Romer, L.J., who dissented from the judgment, should have taken a view fundamentally opposed to that which has always been accepted by the profession since the case of *Stevenson v. Watson* (*ante*, p. 355) was decided. It is difficult to conceive how in any case a builder would consent to an architect's certificate being final and conclusive between himself and the building owner, and that obtaining the certificate should be a condition precedent to his right to receive payment for his work, if the architect were in this respect merely the agent of the employer, the building owner, and owed no duty to the builder to hold the scales even between them.

The relations existing between an architect who is also *Scrivener v. Pask and Thorn* the quantity surveyor, and the building owner; and between the architect and the builder, are shown by the cases of *Scrivener v. Pask*, L.R. 1 C.P. 715, and *Thorn v. Lord Mayor of London*, 1 App. Cas. 120. In the first case, the defendant employed an architect to prepare plans and a specification for a house, and to procure a builder to build it. The architect took out the quantities, and the plaintiffs, the builders, tendered upon the faith of these being correct. They proved to be incorrect, and the plaintiffs had to expend on the building a much larger amount of materials than the quantities showed. Upon this the plaintiff sued, not the architect, but the defendant, to recover the amount he had expended above the contract price. It was held that there was no evidence that the architect acted as the defendant's agent in taking out the quantities, or that the defendant guaranteed their accuracy; and that, therefore, the plaintiff could not recover more than the contract price. "To entitle the plaintiffs to recover, they must make out three things," said Blackburn, J.: "that Paice (the architect) was the defendant's agent, that Paice was guilty

of fraud or misrepresentation, and that the defendant knew of and sanctioned it. There is no evidence here of either of these things. If there has been misconduct on the part of Paice, the plaintiffs have their remedy against him."

In *Thorn v. Lord Mayor of London* (*supra*) plans and a specification for the building of a bridge were prepared for the use of those who tendered for the work; and it was held, in the absence of any express warranty, that the person asking for tenders does not impliedly warrant that the work can be properly carried out according to such plans and specification. The plans and specification were prepared by the defendant's engineers, and it turned out in the course of the work that the bridge could not be built in accordance with the plans. This involved the contractors (the plaintiffs) in much additional expense; for they had tendered upon the basis of the plans which, it was stated, "were believed to be correct." The plaintiffs sued the defendant as upon a warranty that the bridge could be built according to the plans, and alleging the breach; and it was held that no such action would lie. The contractors should have ascertained for themselves that the work could be done in accordance with the specification. "It is said that it is the usage of contractors," said Lord Chelmsford, "to rely on the specification, and not to examine it particularly for themselves. If so, it is an usage of blind confidence of the most unreasonable description."<sup>1</sup>

A contractor is bound by his contract though

A contractor, too, may deprive himself of remedies to which he might have been entitled, by his own negligence. A contractor entered into a building contract without sufficient consideration and reflection, and found as he

<sup>1</sup> See also *Hydraulic Engineering Co. v. Spencer*, 2 Times Rep. 554, where contractors, having undertaken to make cylinders, according to a specification, which should be perfect ones, were not exonerated because it was impossible to make other than defective ones in accordance with the specification.

carried it out, that he was a considerable loser by it; the quantities on which he founded his estimate being less than those given in the working plans he had bound himself to work by. It was held that, nevertheless, his signature not having been obtained by any undue means, he must bear the consequences of having carelessly entered into the contract.<sup>1</sup>

This case also dealt with another point affecting the quasi-judicial position of the architect. The contract provided that all questions between the parties should be settled by the award of the architect. It appeared, however, that the architect had also entered into a contract with the building owner to erect the house for a sum not exceeding £15,000 all told, and the services of the builder had been engaged by the architect without informing him of this contract. The M.R. (Lord Romilly) held, that this circumstance was sufficient to make it impossible for the architect, as in an ordinary case, to decide impartially between the builder and the building owner. The architect had himself a strong pecuniary interest in seeing that the cost did not exceed the £15,000, as the employer could not be called upon to pay more than that sum, without being entitled to deduct it from what he had to pay the architect. The arbitration clause therefore, the architect's contract with the employer having been concealed from the builder, was not binding on the builder; and the architect was really under the circumstances the agent of the employer, and not in a position to act as an impartial arbitrator between the employer and the builder.

A valuer of ecclesiastical property, who holds himself out as such, is bound to possess a knowledge of the general rules applicable to the subject, and of the distinction between the cases of valuation as between an incoming and outgoing tenant, and a valuation as between an incoming and outgoing incumbent. He is not, however, bound to

he has carelessly entered into it.

The architect's position under the contract of arbitrator can be displaced: *Kimberley v. Dick*.

<sup>1</sup> *Kimberley v. Dick*, L.R. 13 Eq. 1.

possess a precise knowledge of the law respecting the valuation of dilapidations as between the incoming and outgoing incumbent. Ecclesiastical surveyors had been employed by an incoming incumbent to act for him to value the dilapidations on his behalf, and to settle the amount to be paid by the executrix of the outgoing incumbent with a valuer appointed by her. By their negligence, the amount to be received by the incoming incumbent was settled at too small a sum. Through their ignorance of the duties they had undertaken to discharge, they valued as between incoming and outgoing tenant, instead of as between incoming and outgoing incumbent. The incumbent brought an action of negligence against the surveyors for damages; and it was held that the surveyors were not in the position of quasi-arbitrators and were not so sued, and therefore an action of negligence would lie. The cause of action was the breach of their undertaking that they were competent to discharge the duties they had accepted; and the verdict of the jury for the defendants was set aside, on the grounds that the verdict was against the evidence, and that the judge had misdirected the jury.<sup>1</sup>

Negligence of patent agents.

A "patent agent," too, is expected to know the law relating to the practice of obtaining patents, though he is not bound to be accurately acquainted with the whole law of patents. He is bound, therefore, to know a decision of the Court which operated to change the practice as to the obtaining of letters patent. Where, through ignorance of this decision, his employer suffers by being prevented from obtaining a patent, this is negligence for which the patent-agent is liable to his employer in damages.<sup>2</sup>

<sup>1</sup> *Jenkins v. Betham*, 24 L.J.C.P. 94.

<sup>2</sup> *Lee v. Walker*, L.R. 7 C.P. 121.

## CHAPTER XXVII.

*Estoppel in pais—Negligent conduct—What is “enabling”  
a fraud to be committed.*

THERE are cases which arise, when the question is which of two innocent persons is to bear a loss that has been sustained, where a person is estopped, or precluded by his negligence, from denying a state of things upon the faith of which another has been induced to rely to his prejudice. In *Carr v. L. & N.W. Ry.*, L.R. 10 C.P. 307,<sup>1</sup> the proposition was thus stated:—“If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.” It is always necessary to observe that any evidence of negligence which can operate by way of estoppel, must be negligence in the transaction itself, and also the proximate cause of the loss. The proposition as to estoppel arising from negligent conduct, had been stated generally to be, “that as a broad general principle whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it.”<sup>2</sup> But this rule has been limited to cases where the

The rule  
in *Carr v.*  
*L. & N.W.*  
*Ry.*

The rule  
as between  
two inno-  
cent  
persons  
and its  
qualifi-  
cations.

<sup>1</sup> And see *Pickard v. Sears*, 6 A. & E. 469; and Parke, B.’s, remarks on that case in *Freeman v. Cooke*, 18 L.J. Ex. 114.

<sup>2</sup> Per Ashurst, J.: *Lickbarrow v. Mason*, 2 T.R. 63; and see also per Wilde, B.: *Swan v. North British Australasian Co.*, 32 L.J. Ex. 273.

conduct or default is in the very transaction itself; and "enabled" means that the neglect was the proximate cause of the mistake.<sup>1</sup> The rule must be qualified, said Blackburn, J., in *Swan v. North British Australasian Co.*, "by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also must be neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy."

This expression of opinion sums up succinctly the whole state of the law on this point.

*Young v. Grote* is no longer law, except as showing that a customer has a duty towards his bankers to draw cheques not in a negligent fashion.

If a man, therefore, loses his cheque-book, or leaves it about not under lock and key, and a thief steals it and forges a cheque by means of which he obtains money from some one, the owner of the cheque-book is not liable to the person who has thus lost his money. The negligence, if any, is not in the transaction itself, and is not such as would naturally and ordinarily lead to the forging of the cheque.<sup>2</sup> But where the drawer of a cheque had drawn it so negligently as to leave room for figures to be interpolated, and the bank, being thus misled, paid the amount which had been interpolated, the negligence there was in the transaction itself, and was the proximate cause of the loss; and the drawer had neglected to perform a duty he owed to the bankers to draw cheques in a reasonable manner. The drawer of the cheque was consequently held not entitled to recover from the bankers the extra moneys they had so paid to the person presenting the altered cheque for payment. The ground was that, as between a customer

<sup>1</sup> *Arnold v. Cheque Bank*, 1 C.P.D. 578; *Swan v. North British Australasian Co.* (*supra*).

<sup>2</sup> *Bank of Ireland v. Evans' Charities*, 5 H.L.C. 389 (*per* Parke, B.).

of a bank and the bankers, the customer owes a duty to them to draw cheques with ordinary care ; and as he caused the bankers to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, he could not complain of the payment.<sup>1</sup>

The *Bank of Ireland case* (*supra*) was one where there was negligence in the custody of the seal of the corporation, whereby the seal was placed to a transfer. "If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary, or ordinary, or likely result of that negligence. It never could have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed."<sup>2</sup> In *Arnold v. Cheque Bank* (*ante*, p. 362), the plaintiffs, merchants in New York, wishing to transmit £1000 to Williams & Co. of Bradford, purchased of Stewart & Co. of New York a draft for that amount, drawn by Stewart & Co. on Smith Payne & Co. of London, payable to the order of the plaintiffs on demand. The plaintiffs having obtained the draft, indorsed it specially to Williams & Co., and inclosed it in a letter to Williams & Co. for the purpose of transmission. The letter was placed in the letter-box in the plaintiffs' office in the usual way to be posted. A clerk of the plaintiffs', one Hecht, stole the letter, forged Williams & Co.'s indorsement, and procured the defendants, who were bankers in London, to present the draft and obtain the money. The bankers having obtained the money, placed it to the account of a person acting in concert with Hecht, who very shortly afterwards

The Bank of Ireland case: negligent custody of seal of a corporation.

Arnold v. Cheque Bank.

<sup>1</sup> *Young v. Grote*, 4 Bing. 253 ; and see this case commented on in *Bank of Ireland case* (*supra*), and *Bazendale v. Bennett*, 3 Q.B.D. (per Brett, L.J., at p. 533). See *Scholfield's case* (*post*, p. 375).

<sup>2</sup> *Bank of Ireland case* (*supra*), and see *Mayor, etc., of the Staple of England v. Bank of England*, 21 Q.B.D. 160.



drew it out. The plaintiffs brought an action for money had and received, and the defendants, in order to show that the plaintiffs' negligence in the custody and transmission of the draft afforded facilities for the fraud, and thus estopped them from suing for the money, tendered evidence that it was an almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was not allowed to be given, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action; and it was held that the plaintiffs' right to the draft, and to sue for the proceeds as money received to their use, was not affected by Hecht's felony. Having held that the property in the draft had never passed out of the plaintiffs—because an "indorsement" consists not only of the written indorsement on the draft, but also of the delivery of the instrument with the intention to transfer the property—the Court held that the money was received by the defendants under a mistake, but tortiously as against the plaintiff, and that, subject to the question whether the plaintiffs had by their conduct disentitled themselves to sue, they might waive the tort, and recover the proceeds as money received to their use. Dealing with the question of the plaintiffs' conduct, it was held that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs; and, further, that the evidence excluded was properly rejected, because it would not, if admitted, have amounted to any defence. The alleged duty, if any, was one which was collateral to the indorsing and forwarding, and its omission could not be the proximate cause of the larceny. "Let us inquire," said Coleridge, C.J., who delivered the judgment of the Court, "how far there was in this case any actual proof of such neglect, or of any breach of duty to the defendants as members of the general public. No authority whatever was cited to us for

the contention that negligence in the custody of the draft will disentitle the owner of it to recover it or its proceeds from a person who has wrongfully obtained possession of it. Here, there was nothing in the draft or the indorsement with which the plaintiffs had anything to do, calculated in any way to mislead the defendants. It was regularly indorsed, and was then inclosed in a letter to the plaintiffs' correspondents, to be sent through the post. There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief." The alleged negligence was therefore not so connected with the subsequent fraud as to disentitle the plaintiffs from relying on the forgery of the indorsement. "The fraud," said Lord Coleridge, "could not have been committed without a larceny of the letter and a forgery of the indorsement."

The plaintiffs were accordingly held entitled to recover the proceeds of the draft from the defendants, who had wrongfully, as against them, obtained possession of it.

This case once more lays down—and it has always subsequently been treated as rightly decided—that, to amount to an estoppel, negligence must be in the transaction itself, be the proximate cause of leading the third party into mistake, and must also be the neglect of some duty owing to such third party or to the general public. It follows from this case, that the mere omission by a person to do something which it is not his duty to do, but which, if done, might have prevented loss to another, is not sufficient to render that person liable for such loss, nor to deprive him of any right which otherwise he would have against the other.<sup>1</sup>

Mere omission to do something which there is no duty to do, is not negligence.

<sup>1</sup> And see *Keith v. Burrows*, 1 C.P.D. 722. This case was reversed, 2 C.P.D. 163, and 2 App. Cas. 636, but on other points.

It is by no means easy to apply the rule that he who has enabled a third person to occasion a loss must, as between two innocent persons, sustain it; together with its qualifications, that the negligence must arise out of the transaction itself, and be the proximate cause of the loss. A case illustrating this difficulty is the well-known one of *Vagliano v. Bank of England* (1891), A.C. 107. The decision in that case, while turning on the effect of the Bills of Exchange Act, 1882, also dealt with the question of estoppel arising out of the conduct of the parties. The plaintiffs, large merchants in London, had a foreign correspondent, Vucina, a merchant of Odessa, who was in the habit of drawing upon them for large amounts, sometimes making the bills payable to another foreign firm, Petridi & Co., of Constantinople. A clerk of the plaintiffs, one Glyka, forged the signature of Vucina to bills purporting to be drawn on the plaintiffs by Vucina to the order of Petridi & Co., and resembling the genuine bills which Vucina used to draw on the plaintiffs. Glyka placed amongst the plaintiffs' correspondence counterfeit letters of advice with respect to these forged bills similar to the letters of advice ordinarily received from Vucina. By these means, Glyka procured the plaintiffs' genuine acceptances to the bills which he had forged. Having thus obtained the acceptances, he proceeded to forge upon them the indorsements of Petridi & Co., the payees named in the bills, and, taking them to the defendants, was paid by them across the counter the amounts for which the bills were drawn. Before payment of any bills, the defendants were advised by the plaintiffs in the ordinary course of business that the bills were coming forward for payment, and these bills were included in the lists sent to them by the plaintiffs. It was held, both by Charles, J. (22 Q.B.D. 103), and by all the members of the Court of Appeal (23 Q.B.D. 243), that the plaintiffs had not been guilty of negligence immediately connected with the transactions so

*Vagliano's case.*

as to disentitle them to recover. This decision was reversed by the House of Lords. "How can it be said," asked Lord Halsbury, L.C., "in this case, that the default is unconnected with the Act? The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina's draft? Was not the customer bound to know whether there was any real transaction between himself and Vucina effected by the instrument in question? Was not the customer bound to know the contents of his own pass-book? Was not the customer bound to know the state of his account with Vucina? It certainly is very strange that it should be suggested that, without any responsibility on his part, he should be entitled to accredit forty-three documents to his bankers as genuine bills, when he had the means of knowledge I have indicated, that no one of them was a bill of exchange at all, or represented any transaction between Vucina and himself.

"The bankers paid upon these documents, and they paid a person who was not entitled to receive the money. There was no person entitled to receive it. The fact that it reached their hands as representing a mercantile transaction in which somebody was to be paid was itself a misleading of them; and that it did reach their hands purporting to represent such a transaction arose from the mode in which Mr. Vagliano's business was conducted by those responsible for it."

The Lord Chancellor pointed out that he threw no doubt on the decision in *Robarts v. Tucker*, 16 Q.B. 560, a case which has long been acted upon and regarded as law, which decided that a banker is responsible when he has paid money on a genuine bill, the indorsement on which has been forged. In those circumstances a customer in effect tells his banker to pay the proceeds of the bill to a particular person, and the banker has, instead, paid some one else by mistake. "But what relation," asked the Lord

A banker is responsible when he pays on a forged indorsement.

Chancellor, "has such a decision to a case where a thing which bears the form and semblance of a known commercial document like a bill of exchange gets by the act of the customer into the hands of the banker, where there is no real drawer, no real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who in the proper and ordinary sense of the word is a payee at all?"

Lord Selborne considered that if the plaintiffs misled the bank upon a material point, though innocently, and though they had been deceived by the fraud which had been committed, the bank ought not to bear the consequential loss. There might be circumstances, as between the banker and the customer, which would rebut the *prima facie* case that the banker, having authority only to pay the payee named on the bill, had acted without authority in paying some other person. Negligence on the customer's part, said Lord Selborne, might be one of these circumstances, and the fact that there was no real payee might be another; "and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *prima facie* case." In dealing with the position of a banker, Lord Selborne said: "A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker; but, beyond this, I see no principle for putting him in a worse position than any other agent."

Lord Watson put his decision on the same grounds: "Throughout these transactions the bank acted in good faith as the agent of Vagliano Brothers, and the errors into which they were betrayed were mainly, if not wholly, attributable to their having treated the bills as genuine,

in reliance upon the representations of their principals, which were untrue. I think that, in these circumstances, Vagliano Brothers cannot be permitted to cast upon the bank liability for errors arising from their own representations." And it made no difference that Vagliano Brothers honestly believed their representations to be true.

There were two dissentient opinions, those of Lords Bramwell and Field, who both considered the view taken by the Court of Appeal to be correct, viz. that the plaintiffs were not precluded from recovering by having been guilty of negligence immediately connected with the transactions.

It is, however, necessary to note, that when it is said that a banker is liable when paying on a forged indorsement, this is not so as regards a bill drawn on a banker payable to order on demand, and paid by that banker in good faith and in the ordinary course of business, by virtue of sec. 60 of the Bills of Exchange Act, 1882; nor (by sec. 82) is it so as regards crossed cheques, if the banker receives payment for a customer, as an agent for collection. If, however, before collection, he credits his customer, he is not receiving payment of the cheque for his customer, but for himself; and he becomes a holder for value. Under the 82nd section the banker is not protected, unless he acts in good faith and without negligence; receives payment for his customer; and unless the banker only receives such payment.<sup>1</sup> In the cases of *Capital and Counties Bank v. Gordon*, and *London City and Midland Bank v. the same* (1902), 1 K.B. 242 (affirmed in the House of Lords, (1903), A.C. 240), the question related to crossed cheques payable to order on demand drawn on banks other than the bankers being sued; and the bankers were held under sec. 82 not to be liable in respect of payments made on forged indorsements; they being within those conditions of protection.

Forged  
indorse-  
ments on  
bills and  
on crossed  
cheques. J

A different case to *Vagliano's case*, where the negligence *Coventry's case.*

<sup>1</sup> *G.W. Ry. v. London and County Bank* (1901), A.C. 414.

of the defendants was the proximate cause of the damage sustained by the plaintiffs, and the defendants were estopped from denying that their misrepresentations of the facts was not the true state of facts, was the case of *Coventry & Co. v. G.E. Ry.*, 11 Q.B.D. 776. The defendants received a consignment of wheat, and issued a delivery order for it. This came into the hands of one Bowden, who obtained advances from the plaintiffs upon it. Shortly afterwards the defendants issued a second delivery order in respect of the same consignment; but the two delivery orders were different, and might reasonably have been supposed to relate to distinct consignments of wheat. In fact, this belief was entertained by the plaintiffs, and acting upon it, they made further advances to Bowden upon this second delivery order. The real state of facts was that both delivery orders related to the same consignment of wheat, and when the plaintiffs came to realize their security, they were informed by the defendants that there was only one parcel of wheat. On Bowden becoming insolvent, the plaintiffs brought an action against the defendants to recover from them the amount advanced to Bowden on the second delivery note, and succeeded. "The production of the document," said Brett, M.R., "was the direct and immediate cause of the advance of the money to Bowden by the plaintiffs. And certainly the negligence of the defendants was to the prejudice of the plaintiffs, and allowed the fraud to be perpetrated upon them. It seems to me, therefore, that the defendants are estopped as against the plaintiffs, their negligence having been the immediate cause of the advance." The form of the documents was different to that in *Carr's case*,<sup>1</sup> which distinguished that case. Brett, M.R., said: "The documents issued by the company are not negotiable instruments, and do not pass the property; but the defendants are estopped from denying the plaintiffs' right to the grain claimed by them." Lindley, L.J., said: "It may be

<sup>1</sup> *Post*, p. 372.

said that the document was only an intimation to men of business, and not a representation to be acted on; but the plaintiffs did not so understand it; as a matter of fact, they were not negligent in not seeing that the document related to the same quantity of goods. It may be said that it is not proved that the documents were treated as delivery orders; but we must look at the facts, and it will be seen from them that the plaintiffs acted upon the documents presented to them. The form of the documents distinguishes this case from *Carr v. L. & N.W. Ry.* (see *post*, p. 372). The documents are of a different kind." Fry, L.J., thought there was some evidence of a custom to sell or pledge goods upon the faith of documents of this kind. Moreover, the defendants had neglected to perform a duty owed to the plaintiffs; as the M.R. said: "There can be no negligence unless there be a duty; but here the documents have a certain mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with the documents."

A similar case was that of *Seton v. Lafone*, 18 Q.B.D. 139; 19 Q.B.D. 68, in which wharfingers' warrants were the documents concerned, and the defendant was held liable; he being estopped from denying he had in his possession the goods specified in the warrant, for he had been guilty of negligence in representing to the plaintiff that he had them in hand, and his negligence was the proximate cause of the loss sustained by the plaintiff, who had purchased the warrant in consequence of the statements made to him. *Seton v. Lafone.*

The proposition, however, laid down in *Carr's case* (*post*, p. 372), and affirmed in *Coventry's case* (*ante*, p. 369), is not open to discussion, *i.e.* that when a defendant has by certain misstatements made by him, and believed by the plaintiff, induced the plaintiff to act in a certain way to his prejudice, and the defendant's conduct in making those statements was culpably negligent, the defendant is liable.



On the question whether any duty is on the defendant in issuing the kind of documents in *Selon v. Lafone* (*supra*), Lord Esher, M.R., said: "I protest that if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and, further than that, I think there is a duty to take reasonable care that the statement shall be correct."

The facts  
of Carr's  
case  
stated.

The facts in *Carr v. L. & N.W. Ry.*, L.R. 10 C.P. 137 (*supra*), in which it was held that the defendants were not estopped from showing that the goods had never in fact reached their hands; and consequently were liable neither in trover, nor for breach of contract in not delivering them, were as follows; and they form an interesting illustration of circumstances which were held not to constitute negligence in the transaction itself, and not to have induced the plaintiff to act as he did. The plaintiff bought goods, which were to be consigned to him at Liverpool from St. Helens by the defendants' railway. On the 7th of July, 1873, he received advice-notes from the defendants to the effect that *three* parcels had been received by them for him; and that they held them subject to his order and to the payment of the charges. The plaintiff thereupon immediately instructed his broker to sell the whole three parcels. Early in August, the plaintiff received invoices of the three parcels from his vendors, and paid for them by an acceptance duly honoured. On the 21st of August the three parcels were sold, and the charges paid on all of them by the broker to the defendants. As a matter of fact, only *two* parcels had been delivered to the defendants, the third still lying at the vendor's premises; and the plaintiff was obliged to pay to the purchasers from him the difference between the price at which they had bought the third parcel and what they had to pay for the other goods. The defendants' servants knew

on the 9th of July that they had never received the third parcel, but no notice of the mistake made in their advice-notes of the 7th of July was given to the plaintiff until the 1st of September, after the goods had been resold and the charges paid. The plaintiff brought an action for non-delivery of the goods and for trover, and his ability to maintain the action depended upon the fact, whether the defendants by their conduct were precluded from denying that they had received all three parcels. In holding that the defendants were not so estopped, the Court said that it could not be asserted that the defendants intended any representation of theirs to be acted upon by the plaintiff in the way of reselling the goods. There was no evidence of any custom to resell upon the faith of an advice-note; and the only intention that could be inferred was, that the consignee should send for the goods. The plaintiff in reselling, therefore, neither acted upon nor was damaged by any representation of the defendants. If he sent for the goods by means of his vendees, he was not damaged by sending for them, but by the resale. The payment of the charges and of the invoice price of the goods could not be relied upon as damage resulting from the defendants' conduct which would support an estoppel, because that damage could be rectified without the intervention of an estoppel: being payments made under a mistake of facts, there was no consideration for them. The jury had found "that the defendants knew of the mistake on the 9th of July, and that there was no sufficient intimation by the defendants to the plaintiff of the mistake." But that finding could have no effect upon the position. If there was any negligence on the defendants' part, it did not induce the plaintiff to resell; and the damage to the plaintiff arose out of the resale. The distinction between this case and *Coventry's case* was, that here the documents issued by the defendants did not amount to a representation by them that the plaintiff could sell the goods.

The  
meaning  
of estop-  
pels being  
"odious."

Bramwell, B., in *Baxendale v. Bennett*, 3 Q.B.D. 525 (*ante*, p. 363), said: "Estoppels are odious, and the doctrine should never be applied without a necessity for it." The learned baron was here making use of a traditional phrase. What is meant by estoppels being "odious" is, that they prevent what everybody knows to be the true state of facts from being acted upon; and thus affirm as facts, what every one knows are not the facts. It is only in this technical sense that estoppels are said to be "odious."

The application of the doctrine, however, proceeds upon the basis that, apart from the real state of facts, a man is held liable for having by his culpable conduct induced another to act prejudicially upon a misrepresentation he has made.

*Baxen-  
dale v.  
Bennett.*

In the case of *Baxendale v. Bennett* (*supra*), an endeavour was made to set up a merely technical estoppel, and it failed. The facts were these: the defendant gave his blank acceptance on a stamped paper to one Holmes, and authorized him to fill in his name as drawer. Holmes returned the blank acceptance to the defendant in the same state as it was given to him; and the defendant put it in a drawer at his chambers which was unlocked, and from there it was lost or stolen. Afterwards, a man named Cartwright, without the defendant's authority, filled in his own name as drawer, and it was indorsed to the plaintiff for value. The plaintiff was the *bonâ fide* holder of the bill, without notice of the fraud, and for valuable consideration; and he sought to make the defendant liable on the bill as the acceptor. In fact, the defendant never accepted a bill drawn by Cartwright, yet it was sought to make him liable, on the ground that he was estopped from denying that he had accepted the bill, because, it was said, he had been negligent in the custody of the blank acceptance. The plaintiff did not succeed. Bramwell, L.J., held that there was no estoppel between the parties which prevented the defendant from setting up the true facts; and if the

defendant had been guilty of negligence, and he thought he had, this negligence was not the proximate or effective cause of the fraud. Brett, L.J., held that the defendant had not been negligent at all. He put the bill in a drawer in his own room, which was not a want of due care, or negligence; because he did not owe a duty to any one, and also because he did not act otherwise than as an ordinarily careful man would act. He held that the plaintiff could not succeed, because, after Holmes had returned the blank acceptance, the defendant never authorized any one to fill in a drawer's name, and he had never issued the acceptance intending it to be used. [See also *Hogarth v. Latham*, 3 Q.B.D. 643, and *France v. Clark*, 26 Ch. D. 257.]<sup>1</sup>

This case resembles the instance put by Parke, B., in the *Bank of Ireland v. Evans' Trustees*, of losing a cheque-book, which has been referred to *ante*, p. 362; and it is difficult to follow Bramwell, L.J.'s, opinion that the defendant had been guilty of any act of negligence.

The case of *Young v. Grote*, 4 Bing. 253 (*ante*, p. 362), has been much and variously commented on judicially as regards the ground on which the decision proceeded; as to its principle and application; and even whether it was founded or not on estoppel. It has finally been decided by the House of Lords in *Scholfield v. Earl of Londesborough*, (1896), A.C. 514, that *Young v. Grote* has no application to the case of an acceptor of a bill of exchange who signs it negligently so as to facilitate a fraudulent alteration of it. In such case the acceptor would not be liable on the

*Young v. Grote* dealt with by the House of Lords in *Scholfield's case*.

<sup>1</sup> Note.—But where a blank acceptance (which in *Baxendale v. Bennett* was never given to any one to be negotiated) is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a drawer and indorser, the acceptor cannot, as against a *bonâ fide* indorsee for value, give evidence to show that either the drawing or the indorsement is a forgery; and he will be liable upon the acceptance. But this is apart from any ground of estoppel; *L. & S.W. Bank v. Wentworth*, 5 Ex. D. 96. And see secs. 20, 24, and 30 of the Bills of Exchange Act, 1882.

altered instrument. As between a customer and a banker, there is a duty on the former towards the latter to fill up a cheque with care, and so as not to give opportunities for its fraudulent alteration which would mislead the banker, and to that extent, it would seem from the judgments in *Scholfield's case*, *Young v. Grote* still holds good. *Young v. Grote* was a case as between customer and banker, where the customer had, by his agent, so carelessly filled up a cheque for £50, that there was room left for a fraudulent alteration of it to £350, which was paid by the banker. But there is no duty on the acceptor of a bill to take precautions against fraudulent alterations in the bill after acceptance. So the House of Lords decided. "The duty of the customer," said Lord Watson, "arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange." The acceptor, therefore, can be guilty of no negligence in this respect, there being no duty imposed upon him.

In *Scholfield's case* a bill for £500 was presented for acceptance with a stamp of much larger amount than was necessary, and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned the bill into one for £3500. A *bonâ fide* holder for value of the bill sued the acceptor for this sum, and the acceptor paid into Court £500, the actual amount of his acceptance. It was held that the acceptor owed no duty of precaution to the plaintiff, and was not guilty of any negligence; and judgment was given for him. "It is not consistent," said Lord Watson, "with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate."

*Bank of*

Another case where a cheque was fraudulently altered

by a customer, whereby a bank, other than the customer's *Canada v. Bank of Hamilton*, suffered loss, is the more recent one of the *Imperial Bank of Canada v. Bank of Hamilton* (1903), A.C. 49. One Bauer was a customer of the Hamilton Bank (the respondent), and he drew a cheque on that bank for 5 dols., so drawn as to leave a space between the word "five" and the next printed words. He then got the cheque "certified" by the bank's mark or stamp, which indicated that there were funds at the bank sufficient to meet the cheque, and thus gave the cheque additional currency. After he got it "certified," Bauer fraudulently altered the cheque into one for 500 dols. by adding the word "hundred" after the word "five." Bauer then took the cheque so altered to the Imperial Bank (the appellant) and opened an account with it. The cheque was placed to his credit, he drew upon this account forthwith, and his cheques were honoured in the ordinary course. The cheque was passed through the clearing-house and was paid by the Hamilton Bank, who had not then discovered the fraud. It had been paid, therefore, by the respondent to the appellant, who was a holder for value, under a mistake of fact; and next day the fraud was discovered.

The respondent bank brought an action against the appellant bank to recover back 495 dols. from it. It was held in the Privy Council that the respondent bank might show, as between itself and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified; and *Scholfield's case* (*ante*, p. 375) was followed. It was further held that no negligence was imputable to the respondent in cashing the cheque without examining the drawer's account; and even if it were, that fact did not induce the appellant to treat the cheque as good. It was alleged that the respondent bank was negligent in cashing the cheque, and in the opinion of the Court it undoubtedly had the means of ascertaining from its own books that the cheque had been altered. "But means of

knowledge," said Lord Lindley, "and actual knowledge are not the same; and it was long ago decided in *Kelly v. Solari*, 9 M. & W. 54, that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. . . . There was nothing on the face of the cheque to excite suspicion." Moreover, even if there were any negligence, it did not induce the appellant to treat the cheque as good, and give Bauer credit for it; for that the appellant bank had already done before the cheque was cashed. As to the question of estoppel, Lord Lindley said: "The cheque was a good one for 5 dols. But after Bauer (the drawer of the cheque) had got it marked he wrote in the word 'hundred' after the word 'five.' There can be no doubt that the condition of the cheque when certified afforded opportunity for this fraudulent alteration; and if the principle laid down in *Young v. Grote* (*ante*, p. 362) could still be acted upon, the Bank of Hamilton (the respondent) would, as between themselves and an innocent holder for value, be estopped from denying that the cheque was a certified cheque for 500 dols. But after the decision in *Scholfield's case* (*ante*, p. 375), it was hopeless to contend that by the law of England the Bank of Hamilton was not at liberty to prove that the cheque had been fraudulently altered after it had been certified by the bank."

*Farquharson v. King.*

*Farquharson Brothers v. King & Co.* (1902), A.C. 325, raised the question of estoppel upon a fraudulent conversion of goods, as between two innocent persons. The Court of Appeal, misreading some observations of the Lord Chancellor in *Henderson v. Williams* (1895), 1 Q.B. 521, gave effect to the old statement, "that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," without having regard to the qualification of that statement as expressed by Blackburn, J. (*ante*, p. 362), or to any restricted meaning of the word "enabled."

The appellants were timber merchants, and warehoused their timber with a dock company, whom they instructed to accept all transfer or delivery orders signed by their clerk. Capon, this clerk, had authority to make limited sales to their known customers, and was the appellants' confidential clerk. Capon, under the assumed name of Brown, fraudulently sold the appellants' timber to the respondents, who knew nothing of the appellants or of Capon under his real name, and who bought and paid Capon (as Brown) for the timber in good faith. Capon's mode of procedure was to give the dock company orders for the transfer of the timber to Brown, the name he assumed; and then in that name he gave delivery orders to the respondents. It was held, overruling the Court of Appeal, that the appellants, not having held out Capon to the respondents as their agent to sell to them, were not estopped from denying that he had their authority to do so. Capon, upon this being shown, had no title or apparent authority himself, and could not give the respondent any title to the stolen timber; and the appellants were entitled to recover the value of the timber from the respondents. Lord Halsbury, L.C., thought that the fact that the timber was stolen, and that the thief therefore could convey no title, was amply sufficient to dispose of the case. But dealing with the question of estoppel entered into by the Court of Appeal, he was of opinion that no question of estoppel arose at all. "Estoppel arises," he said, "where you are precluded from denying the truth of anything which you have represented as a fact although it is not a fact; but no such question arises here." What the dock company did, they were expressly authorized to do by the appellants; no estoppel could arise therefore as between them and the company. If the facts had been that the appellants had represented Capon to have their authority to sell to anybody, and if some one had acted on that representation and sustained loss by doing so, estoppel



would have arisen, and the appellants would be estopped as against the purchaser from denying the authority they had negligently represented Capon to have. But here the respondents did not act upon any such representation, even if there had been one. They knew nothing of the appellants in the transaction, or of Capon, or of any authority he was supposed to be invested with by anybody. They were buying from Brown. "The real defence," said Lord Macnaghten, "is a singular one. It comes to this: the defendants say to the plaintiffs, 'You, Messrs. Farquharson, have conducted your business in such an unbusiness-like way that you ought not to have your own goods back again. This misfortune common to you and to us is all your fault. By your foolish confidence in Capon, and by the written authority you gave him, you "enabled" him to commit this fraud upon us.' And so Ashurst, J.'s, famous dictum comes in,<sup>1</sup> and you must sustain the loss." He then goes on to show that such a defence cannot be sustained by authority or on principle, and proceeds to cite the cases qualifying Ashurst, J.'s, dictum. Though, no doubt, Capon was "enabled" to commit the fraud by having been employed by the appellants, this was only in the same sense as that a tradesman who sells a pistol to a man "enables" that man to commit a murder with it. This is not sufficient to make him liable, and "the broad general proposition" as to the rights between two innocent parties must be qualified in the way already pointed out.

It will, therefore, be seen, that if the doctrine of estoppel is to be successfully set up, so as to preclude the true state of facts being put forward, there must, of necessity, have been a representation regarding the facts upon which reliance has been placed; and the consequences of so acting, must have enured to the prejudice of the person who relied on the representation. This point is more particularly brought to a focus in the case of *Bell v. Marsh* (1903), 1 Ch.

*Bell v.  
Marsh.*

<sup>1</sup> In *Licklarrow v. Mason* (ante, p. 361).

528. In 1893 the plaintiff employed a solicitor to investigate the title to, and complete the purchase of, a house and land he had agreed to purchase. This the solicitor did for him, and the plaintiff paid the purchase-money. The solicitor was the owner of a house and land immediately adjoining that which the plaintiff purchased, and had, when some time previously erecting a greenhouse upon his land, encroached upon the land which the plaintiff had purchased. He had been in possession of the greenhouse long enough at that time to acquire a good title to the whole of it under the statutory period of limitation. The boundaries of the two properties were not clearly defined, and the solicitor was entirely ignorant of the encroachment; but he might have ascertained this fact when he was investigating the title for the plaintiff, if he had measured the property. In 1898 the plaintiff discovered that part of the greenhouse was, in fact, situated on the land comprised in his conveyance, but did not communicate this to the solicitor, who died in 1899. In 1901 the plaintiff brought an action against the solicitor's representatives to recover possession of that portion of the site of the greenhouse which was upon his land; and he urged that, by reason of the solicitor's negligence, an estoppel had arisen, which prevented the defendants from setting up, as against him, the deceased solicitor's title by adverse possession to that portion of the land. As regards the point of negligence, the Statute of Limitations had at that time run out, so that an action for negligence could not have been sustained; and as regards the estoppel, the plaintiff at the trial admitted that he had not been induced to make the purchase by any representation of the solicitor as to the boundary of the property; that he knew before he entered into the contract to purchase, that the greenhouse belonged to the solicitor; and that he never supposed that he was purchasing any portion of its site. The Court of Appeal, overruling Buckley, J., held that the plaintiff

To establish an estoppel, a person must have been prejudiced by reliance on a representation made.

A representation may be by conduct, and conduct may include negligence.

was not entitled to succeed in his action. The question was, whether the defendants were estopped from saying that the piece of land belonged to the solicitor; and upon that Collins, M.R., said that the plaintiff must show that the conditions which create an estoppel had arisen. "How does the plaintiff make that out?" he asked. "It must be admitted (for it is the plaintiff's own evidence) that he was under no impression that he was acquiring any part of the greenhouse, and that he did not find out he had bought it until four years after the conveyance. It seems to me that, in order to found an estoppel against Urry (the solicitor), the plaintiff must show that he was led to change his position by representations made for the purpose, or that representations were made by Urry, on the faith of which the plaintiff acted. If he cannot do that, he cannot succeed. He is entitled to say that the representation was made, not merely by language used, but by conduct, and conduct may include negligence. A man may act so negligently that he must be deemed to have made a representation, which, in fact, he did not make, but because he has acted negligently he is deemed to have made it." He was of opinion that the estoppel broke down at the crucial point. "The defendants are not debarred from averring the truth, unless the plaintiff can show that he has acted to his own prejudice on the representation, or that he relied upon negligence amounting to representation, and that the representation was the proximate cause of his action." After citing *Swan v. North British Australasian Co.* (*ante*, p. 362) with approval, he remarked that the plaintiff's admission at the trial negatived the notion that he had been led to change his position by what is called representation. "How can he say that he was led to act in the belief that he was getting the whole, when at the same time he says that he never intended to get any part of the greenhouse?" Nor was the learned judge satisfied that the plaintiff had made any case of estoppel by negligence. "The neglect, if

neglect there be, must be in the transaction itself, and must be the proximate cause of leading the plaintiff into the mistake." But as he bought the property, not intending to buy, or supposing that he was buying, any part of the greenhouse, "the negligence, if proved, was not the proximate cause of any loss which he has sustained. I am not sure that Buckley, J., fully appreciated the vast importance, as regards the doctrine of estoppel, of the fact that the person seeking to set it up was induced to change his position on the faith of the representation."

Three actions tried together were decided by Bigham, J., in the *Union Credit Bank v. Mersey Docks* (1899), 2 Q.B. 205, and they illustrate the doctrine of estoppel arising from negligent conduct, and the point whether it is the proximate cause of the loss sustained. *Union Credit Bank v. Mersey Docks.*

One Nicholls, a tobacco broker, pledged with the plaintiffs, as security for an advance, eighteen hogsheads of tobacco which were in the defendants' custody as warehousemen. Nicholls subsequently repaid the advance on one of the hogsheads, and presented to the plaintiffs for their signature a delivery order on the defendants. The space for the number of hogsheads to be delivered was left blank, and the plaintiffs signed the delivery order in that state. Nicholls then filled up the vacant space by inserting "eighteen hogsheads," and thus obtained from the defendants the delivery to him of all the tobacco, which he then disposed of. The plaintiffs brought an action against the defendants for conversion of the seventeen hogsheads. It was held by the learned judge that they could not succeed. They had impliedly given Nicholls authority to fill up the blank in the delivery order, and were therefore estopped from showing that the authority was limited to one hogshead. It was their duty towards the defendants to fill in the delivery order in such a way as to indicate to the defendants what goods they were to deliver. This duty they allowed Nicholls to perform for them; for until the

blank was filled up there was no delivery order at all. As they had delegated the performance of this duty to Nicholls, they were bound by what Nicholls did in discharging it. "They intended that the defendants should act upon the document after it was perfected by Nicholls, and I do not think they can be heard to say that they only intended Nicholls to perfect the order in a particular way." In the second action, Nicholls had pledged with the plaintiffs two separate consignments of tobacco. He paid off the advance on one consignment, and presented to the plaintiffs a properly drawn delivery order in respect of it, which they signed. Subsequently Nicholls fraudulently added above their signature, there being sufficient blank space to do so, the description and marks of the other consignment, and thus obtained from the defendants the delivery of both consignments. There, the plaintiffs were held entitled to succeed on an action against the defendants for the conversion of the second consignment; because the plaintiff had not been guilty of any negligence which was the proximate cause of the wrongful delivery. The alleged negligence was, that they had signed a form of document by which it was possible for a dishonest person to make such an alteration; but that this cast no liability upon them is shown by the remarks of Lord Watson in *Scholfield's case* (*ante*, p. 375), and no duty being neglected, they had not made any representation with regard to the second consignment. In the third action, Nicholls, after thus fraudulently obtaining the tobacco, pledged it with the defendant bank as security for an advance; and before the fraud was discovered, he had repaid the advance to the bank and recovered possession of the tobacco from them. It was held that no action for conversion would lie against the bank, because Nicholls' dealings with it had been concluded before the plaintiffs discovered the fraud; or knew anything of the plaintiff's title to the goods.

Where documents are negotiable instruments, deliverable from hand to hand, whether scrip,<sup>1</sup> bonds and debentures,<sup>2</sup> or instruments which, though not negotiable ones by the general law, have been treated by mercantile usage or custom as negotiable,<sup>2</sup> a good title is obtained by a *bonâ fide* holder for value on delivery to him. A person taking such instruments as being negotiable cannot, after negligently allowing another person the means of fraudulently transferring them to a *bonâ fide* holder, be heard to deny that the instrument is a negotiable one transferable to bearer by delivery.<sup>1</sup> Even though the conduct of the plaintiff may not estop him from denying the defendant's title, if the instrument is a negotiable one transferable by delivery, the title of the defendant who has received it in good faith is good as against the plaintiff.

Negotiable instruments.

Bechuanaland case.

In the *Bechuanaland case*,<sup>2</sup> the plaintiffs, a limited company, were possessed of certain debentures issued by an English company in England payable to bearer, which by reason of the conditions indorsed on them were not promissory notes. The debentures were kept in a safe, of which the plaintiffs' secretary had the key. The secretary fraudulently took the debentures from the safe and pledged them with the defendants for advances; and the defendants received the debentures in good faith. The debentures were proved to have been for many years treated in the mercantile world and on the Stock Exchange as negotiable instruments transferable by mere delivery. The plaintiffs brought an action against the defendants to recover the value of the debentures, but did not succeed. It was held that, though there was nothing in the conduct of the plaintiffs which would estop them from denying the defendants' title, yet the defendants were entitled to

<sup>1</sup> *Goodwin v. Roberts*, 1 App. Cas. 476.

<sup>2</sup> *London Joint Stock Bank v. Simmons* (1892), A.C. 201; *Edelstein v. Schuler* (1902), 2 K.B. 144; *Bechuanaland Exploration Co. v. London Trading Bank* (1898), 2 Q.B. 658.

the debentures as against the plaintiffs, on the ground that the debentures were negotiable instruments transferable by delivery.

In *Goodwin v. Roberts* (*supra*) the negotiable instruments had been left by the plaintiff in the hands of his broker to be exchanged for bonds, or sold, as the plaintiff should direct; and the broker fraudulently deposited them with the defendant bank as security for a loan to himself. Cairns, L.C., there was of opinion, as another ground by which the decision could be supported, that the doctrine of estoppel applied. If it were assumed that the instruments were not negotiable, "still the appellant is in the position of a person," said Lord Cairns, "who has made a representation, on the face of the scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. I am of opinion that on doctrines well established, of which *Pickard v. Sears*, 6 A. & E. 469, may be taken to be an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired."

In the *Bechuanaland case*, Kennedy, J., thought that on the facts estoppel did not arise. No negligent conduct could be imputed to the plaintiffs from the way in which they took charge of their security. The ordinary and proper mode was to keep it under lock and key, and to leave the custody of the key with the secretary was a proper course to pursue. The facts of the case had not, he pointed out, the same legal significance as those in *Goodwin v. Roberts*, where the documents were placed by their owner in the hands of a broker, to be dealt with by him as the owner should direct.

It may be noticed that Lord Bramwell, in the case of *Colonial Bank v. Cady*, 15 App. Cas. 267, at p. 282, declared

that he was unable to see any ground for applying the doctrine of estoppel to the facts of *Goodwin v. Roberts*, as Lord Cairns had done.

But whether securities are negotiable instruments or not, if the pledgee knows, or has reason to believe, that the securities do not belong to the pledgor but to other people, he ought to inquire into the pledgor's authority to deal with them, and not doing so, the pledgee is not in the position of a purchaser for value without notice.<sup>1</sup>

There are various other estoppels, which, however, do not come within the scope of this book; but one case may perhaps be usefully referred to, where a plaintiff, having brought an action in the County Court for damages to his cab occasioned by the defendant's negligence, and having recovered the amount claimed, afterwards brought an action in the High Court against the same defendant for damages in respect of personal injuries he had sustained through the same act of negligence. The Queen's Bench Division had held that the plaintiff could not do this, because he might have claimed for the personal injuries in his first action; but the Court of Appeal overruled this decision, and held that, as the causes of action were distinct, the plaintiff was not barred from bringing an action subsequently for the personal injuries he had sustained.<sup>2</sup>

<sup>1</sup> *E. of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333.

<sup>2</sup> *Brunsdon v. Humphrey*, 14 Q.B.D. 141. See also *Serrao v. Noel*, 15 Q.B.D. 549; *Darley Main Colliery v. Mitchell*, 11 App. Cas. 127.





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THE END.

*Ex. J.M.  
10/4/04*

















